

KF
915
526
1853

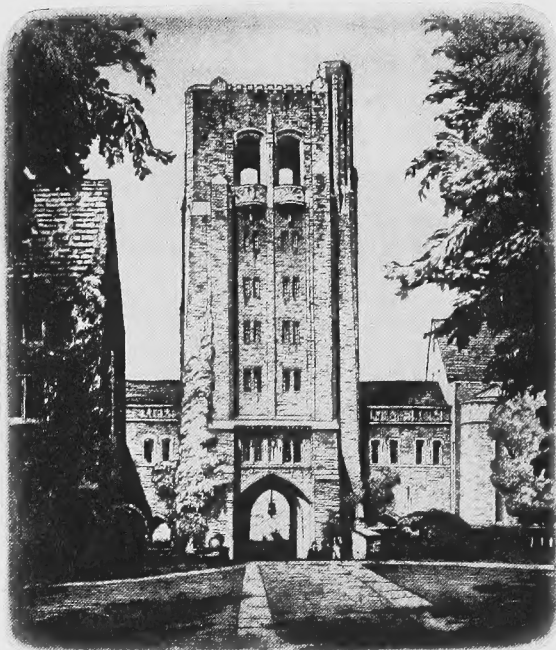
Cornell University Library
KF 915.S88 1853

A treatise on the law of sales of person

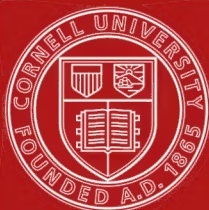


3 1924 018 845 143

law



Cornell Law School Library



Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

<http://www.archive.org/details/cu31924018845143>

LITTLE, BROWN & CO.'S LAW ADVERTISER.

112 WASHINGTON STREET, BOSTON.

JUNE, 1854.

ENGLISH
LAW AND EQUITY REPORTS.

THE COMMON LAW, EQUITY, CRIMINAL, ADMIRALTY, AND
ECCLESIASTICAL REPORTS, COMBINED.

EDITED BY EDMUND H. BENNETT AND CHAUNCEY SMITH, ESQRS.

THE unprecedented patronage this series of reports has received, has now established it upon a permanent basis. It combines all the cases of about twenty distinct series of English Reports, and is the only work published which contains all the reported cases; every case is reprinted entire, uncondensed and unabridged. Subscribers may rely upon having an exact reprint of the original English case, and in a few weeks after its first publication abroad. This series commences with the decisions of Michaelmas (November) Term, A. D. 1850, or about the 15th or 16th volume of Adolphus & Ellis, in the Queen's Bench; vol. 10 of Manning, Granger & Scott, in the Common Pleas; and vol. 5th of Welsby, Hurlstone & Gordon, in the Exchequer.

The Publishers confidently recommend these Reports, as containing all the English cases upon each special department of the law, and at the same time as comprising the whole body of the law in a cheap, accessible, and convenient form. To legal authors, especially, the convenience of so complete a compendium of the law must be invaluable.

These Reports are now regularly digested in our Annual United States' Digest, which thus embraces an Annual Digest of the whole English and American Law.

For the greater convenience of the profession, we shall hereafter publish a table of all the cases in these Reports, with a reference to the volume and page of every other series where the same case may be found.

Vols. I. to XXI. now ready for delivery, at \$2.00 per volume, to permanent subscribers.

"In these days of steam and telegraphs, the most recent information from Westminster Hall is demanded, and this demand the great Boston publishing house seeks to supply, and do supply, by the series now before us. We have so frequently commended the former volumes, that it is now only necessary to announce the fact of publication, to inform the Bar that the volumes may be purchased." *American Law Register*.

"This is one of the cheapest and best of the republications of English cases, in this country. At the close of each year, the subscriber is furnished with a faithful and accurate report of every important case which has been decided in any of the Courts of England during the preceding year. The work can be cited as an authority at the bar, like other reports; and for fulness, clearness, and comprehensiveness of detail in all the departments of practice, it is equal to any work of the sort with which we are acquainted." *Richmond Examiner*.

"We cannot hesitate to say that these reports are edited with judgment and ability. The eighteen volumes now published, going back over a period of three years, contain two thousand six hundred cases. Of these, one thousand four hundred are from the House of Lords, Privy Council, Chancery, Admiralty, and Ecclesiastical Courts, and these cases are not in any other series accessible in this country, to our knowledge. Not more than one half of the other cases contained in these volumes have been, so far as we know, elsewhere published in the United States. These are very striking facts; and, as lawyers, we consider it of great value to the jurisprudence of the country, that the learning, sobriety, and wisdom of the English Bench and Bar and Senate are now placed within the means of so many of our professional brethren." *N. Y. Legal Observer*.

"The current English Reports are essential to every American lawyer of respectable practice, and it is fortunate for the purses of the profession that Messrs. Little, Brown and Company have had the enterprise to undertake the reprint at the low price of two dollars per volume — little more than the cost of an ordinary muslin-bound novel — and this, too, with paper, type, and binding in quality worthy of the best law books in the world, and neat as the publications of this Boston house characteristically are." *N. Y. Commercial Advertiser*.

"We are happy to learn that there is no prospect of a discontinuance of these reports. We are not, however, surprised, that a series which in three years has given two thousand eight hundred and seventy-seven cases, more than four fifths of which, including over one thousand five hundred from the House of Lords, Privy Council, Court of Chancery, and the Admiralty and Ecclesiastical Courts, have not been published in any other series in this country as yet, and whose character, extent, and price will compare favorably with other reports, should meet sufficient encouragement from the profession to be beyond the possibility of failure." *N. Y. Evening Post*.

"Every member of the profession should subscribe to what is not only the best and earliest, but the cheapest reprint of English cases published in this country." *Legal Intelligencer*.

WORKS RECENTLY PUBLISHED.

ANGELL ON FIRE AND LIFE INSURANCE. A Treatise on the Law of Fire and Life Insurance. With an Appendix, containing Forms, Tables, &c. By Joseph K. Angell, Esq. 1 vol. 8vo. \$5.00.

"This work, which we have been permitted to examine in proof-sheets, will be an important acquisition to the public in a right understanding of the two vitally important subjects upon which it exclusively treats, and will be as valuable to business men as to gentlemen of the legal profession.

Mr. Angell has acquired a large reputation as a succinct, clear-headed, and thoroughly investigating legal author, and this his latest work will greatly add to his acknowledged ability in these respects.

The style and execution of the whole work, in the opinion of competent legal judges, will well compare in succinctness and condensation with the best models of the late distinguished Professor Greenleaf." *Boston Post.*

"We are prepared to welcome a new work on insurance from any author of acknowledged learning and ability, and especially from Mr. Angell, whose previous treatises on various legal subjects have been highly appreciated. Marine insurance having been most amply discussed by other American writers, he has judiciously limited the present work to life and fire insurance, and has thus been enabled to state the law and illustrate it clearly and copiously. The volume is thoroughly indexed, so as to facilitate reference; the notes justify the text with numerous authorities, and are enriched with illustrative lore; and the book seems to us in all respects worthy of much praise. Its utility to the profession is at once apparent, but we esteem it no less valuable to the whole army of insurers and insured,—in short, to every man of property in the United States. We do not recommend every man to be his own lawyer, as there is danger that, in accordance with the adage, he may have a fool for his client, but a certain degree of legal science is an essential part of education. The officers of insurance companies are a class to whom Mr. Angell's treatise is of peculiar interest and importance. Indeed, it may be considered indispensable to them." *N. Y. Commercial Advertiser.*

"We know of no legal work, published within ten years, which was more needed by all those who are interested in those two branches of the law of insurance; and in a careful perusal, we are satisfied that no expectation, founded upon the previous high reputation of the author, can be disappointed either in the manner and in the matter of the execution of the treatise. We think the work is fairly entitled to what we consider the highest praise of a law book, accuracy of the detail and exhaustion of the subject. From the reactivity of the period at which the themes involved came to be extensively agitated in the tribunals of the law, Mr. Angell has happily been able to accomplish this end without overloading his book with too numerous citations and references, while at the same time, we are confident in the assertion that the practitioner and the student cannot fail to find in these pages, *all of principle and all of precedent belonging to Life and Fire Insurance.* The style is concise and clear, the reasoning vigorous and bold. In short, we regard this as the best of the many valuable legal treatises which the pen of Mr. Angell has produced. We should think no lawyer, no insurance office could afford to be without the book a single day." *Bee.*

"It is executed with the care and analytical completeness which characterize Mr. Angell's law writings, and is so comprehensive in its topics and references, as to leave little if any thing to be desired by those who may consult it. . . . This work will thus be found to be not only advantageous to the members of the legal profession, but also highly useful and instructive to all persons who are par-

ties (and there are few who are not) to the contract either of Life or of Fire Insurance. Prefixed to the work is an index of the cases which are cited in its several chapters, comprising the great body of the litigation which has arisen on the subject, and at the end is an appendix containing a copious collection of forms and statistics relating to the business of insurance and the usages which regulate it. The volume is withal very handsomely printed, and furnishes one of the best specimens of Messrs. Little & Brown's series of law publications." *Providence Journal*.

PARSONS ON CONTRACTS. Vol. I. A Treatise on the Law of Contracts. By Hon. Theophilus Parsons, Professor in Dane Law College, Cambridge, Mass. Vol. I. 8vo. \$5.50.

"In conclusion, we feel bound to say that we regard this work, taken as a whole, clear in statement, diligent in citation, accurate in detail, commendable in research, excellent in learning, simple in style, and altogether the most carefully considered, and best prepared exhibition of the comprehensive law of contracts, that has ever yet been presented in the English language." *American Law Register*.

"A work which we regard as admirable in method, clear in statement, and evincing great research, and great learning. We regard it as altogether the best work on the subject that has ever been written, and in many respects the best legal treatise of which we have any knowledge; and we desire to add, that it is written in a style so clear and simple, that persons out of the profession will find it both useful and interesting." *Boston Daily Advertiser*.

This work has evidently been done with great labor, care and exactness; and whoever purchases the work, will have the substance of the law, upon the subjects discussed therein, that is contained in the volumes of the library of the Law School at Cambridge. We look forward with interest to the appearance of the second volume, and when it is published we propose to refer again more fully to the entire work. *Law Reporter*.

BISHOP ON MARRIAGE AND DIVORCE. Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits. By Joel Prentiss Bishop, Esq. 1 vol. 8vo. \$5.00.

"It is a remarkable fact, that until the publication of these Commentaries by Mr. Bishop, there was no elementary treatise on the law of marriage and divorce which was at all adequate to the requirements of either the student or the practitioner. . . . We remember at this moment a case in which Mr. Bishop's work would have saved counsel more than a day's labor in research for judicial dicta on an obscure point. The utility of the work will, indeed, be frequently tested. Suits of divorce are becoming alarmingly numerous. While in Utah, the Mormons are reverting to the barbarous practice of polygamy, in other sections of the country one wife seems to be thought by some people more than enough. In the little state of Rhode Island, it is said, that about sixty divorce cases were recently pending before the Supreme Court; and in California, divorces have become so common that newspapers publish regular lists of them, in the same manner as marriages and deaths. In view of these circumstances, there can be no question that the work under notice is in the highest degree opportune and useful, since it is the only thorough treatise on the subject." *N. Y. Commercial Advertiser*.

"Among the few first-rate treatises which should form the indispensable furniture of a lawyer's library." *N. Y. Legal Observer*.

CUSHING ON THE ROMAN LAW. An Introduction to the Study of the Roman Law. By Hon. Luther S. Cushing. In one volume. 8vo. cloth, \$1.25.

TAYLOR'S LANDLORD AND TENANT. Treatise on the American Law of Landlord and Tenant, embracing the Statutory Pro-

visions and Judicial Decisions of the several United States in reference thereto, with a selection of precedents. By John N. Taylor. Second Edition, revised and enlarged. 8vo. \$4.50.

"There can be no question that this treatise is indispensable to every legal practitioner in the United States. It covers important ground which no other work that we know of even pretends to occupy." *N. Y. Com. Advertiser*.

DAVIS'S JUSTICE. A Practical Treatise upon the Authority and Duty of Justices of the Peace, in Criminal Prosecutions. By Daniel Davis, Solicitor-General of Massachusetts. Third Edition. Revised and greatly enlarged. Edited by F. F. Heard, Esq. 1 vol. 8vo. \$4.00.

CHITTY'S EQUITY DIGEST. An Index to all the Reported Cases decided in the several Courts of Equity in England and Ireland, the Privy Council, and the House of Lords; and to the Statutes on or relating to the Principle, Pleading, and Practice of Equity and Bankruptcy, from the Earliest Period. By Edward Chitty, of Lincoln's Inn, Barrister at Law. New Revised Edition, brought down to the Present Time. 4 vols. 8vo. \$25.00.

THORNTON'S CONVEYANCING. Digest of the Conveyancing, Testamentary, and Registry Laws of all the States of the Union, embracing References to the Leading Decisions upon these subjects, in most of the States; together with the Forms of Acknowledgment, Probate, Relinquishment, &c., required by the Statutes of, and in use in each, preceded by a brief Treatise on the General Rules relating to the Nature, Execution, and Operation of Deeds and Wills, and followed by an Appendix of the most approved general Forms of those Instruments, being a practical Manual and Guide for Lawyers, Public Officers, and Men of Business. Second Edition, revised and enlarged. 1 vol. 8vo. \$4.50.

GREENLEAF ON EVIDENCE. Vol. III. A Treatise on the Law of Evidence. By Hon. Simon Greenleaf, LL. D. Vol. III. 8vo. \$5.50.

ENGLISH ADMIRALTY REPORTS. A complete series of all the English Admiralty Reports down to Part III. of W. Robinson's Rep. Vol. 3, (or to the commencement of our Series of "English Law and Equity Reports,") with notes by George Minot, Esq., and comprising all Cases reported in the Seven Volumes of Notes of Cases, which are not contained in the regular Reports, and all the Appeal Cases in Knapp's P. C. Rep. and Moore's P. C. Rep. Vol. I. contains 1 and 2 C. Rob.; Vol. II., 3 and 4 C. Rob.; Vol. III., 5 and 6 C. Rob.; Vol. IV., Edwards, Hay & Marriott, and the Appeal Cases in Knapp & Moore; Vol. V., 1 and 2 Acton, and Selections from Notes of Cases; Vol. VI., 1 and 2 Dod.; Vol. VII., 1 and 2 Hagg.; Vol. VIII., 3 Hagg. and 1 W. Rob.; Vol. IX., 2 W. Rob. and 3 W. Rob., Parts I. and II. These Reports for sale only in sets. 9 vols. 8vo. \$31.50.

PHILLIPS ON INSURANCE. A Treatise on the Law of Insurance. By Willard Phillips. Third Edition, enlarged. 2 vols. 8vo. \$10.00.

HILLIARD ON MORTGAGES. A Treatise on the Law of Mortgages of Real and Personal Property: being a General View of the English and American Law upon that subject. By Francis Hilliard, Esq. 2 vols. 8vo. \$7.50.

WORKS IN PRESS
AND PREPARING FOR PUBLICATION.

PARSONS ON COMMERCIAL LAW. The Principles of Commercial Law. By Hon. Theophilus Parsons, LL. D., Dane Professor in the Law School of Harvard University, in Cambridge. 2 vols. 8vo.

The principal topics of the first volume will be, the Origin and History of the Law Merchant; the Law of Partnership; of Sales; of Agency; of Bills and Notes; and of Marine Insurance. The second volume will contain the Law of Shipping, and the Law and Practice of Admiralty.

BISHOP ON CRIMINAL LAW. Commentaries on Criminal Law. By Joel Prentiss Bishop, Esq., author of Commentaries on the Law of Marriage and Divorce. The first volume to be a complete elementary Treatise of itself.

This work is intended to embrace the entire field of English and American Criminal Jurisprudence, traversed by *new paths*. It will be both elementary and practical, adapted alike to the use of the student, the magistrate, and the practising lawyer; and, on important points, will contain citations of all the English and American cases.

AMERICAN RAILROAD CASES. A Complete Collection of the American Cases relating to the Rights, Duties, and Liabilities of Railroads, with Notes and References to the English and American Railway, Canal, and Turnpike Cases. By Chauncey Smith, Esq. 2 vols. 8vo.

ENGLISH RAILWAY CASES. Cases relating to Railways and Canals, argued and adjudged in the Courts of Law and Equity, from 1835 to 1852. Edited by Samuel W. Bates, Esq. 6 vols. 8vo.

PARSONS ON CONTRACTS. A Treatise on the Law of Contracts. By Hon. Theophilus Parsons, Professor in Dane Law College, Cambridge, Mass. In 2 vols. 8vo. Vol. I. now ready.

THE LAW OF ADMIRALTY. Leading Cases in Admiralty and Shipping, with Notes and Commentaries. By a Member of the Suffolk Bar. In one volume. 8vo.

BLACKBURN ON THE CONTRACT OF SALE. A Treatise on the Law of Sales. By C. Blackburn. With additions, notes, and references. By William P. Wells, Esq. 1 vol. 8vo.

ATTACHMENT. A Treatise on the Law of Suits by Attachment in the United States. By Charles D. Drake, Esq., of St. Louis. 1 vol. 8vo.

ARBITRATION. Arbitration at Common Law in Equity, and under the Statutes of the States of the United States. By Edward G. Loring, Esq., of the Suffolk Bar.

- VENDORS AND PURCHASERS.** The Law of Vendors and Purchasers of Real Property. By Francis Hilliard, Esq. 2 vols. 8vo.
- BANKRUPTCY.** The General Law of Bankruptcy and Insolvency, and the Application of its Principles, under the Bankrupt Laws of England and the United States, and the Insolvent Laws of England and the States of the United States. By Edward G. Loring, Esq., of the Suffolk Bar.
- HUSBAND AND WIFE.** The Principle and Rules of Law Regulating the Property of Husband and Wife; and Civil Actions therefor. By Edward G. Loring, Esq.
- PATENT CASES.** A Collection of the United States Patent Cases. Edited by James B. Robb, Esq. 2 vols. 8vo.
- WHEATON'S INTERNATIONAL LAW.** Elements of International Law. By the late Hon. Henry Wheaton, LL. D. Fourth Edition, Revised, Annotated, and brought down to the present time, with a Biographical Notice of Mr. Wheaton, and an Account of the Diplomatic Transactions in which he was concerned. By Hon. William Beach Lawrence, formerly Charge d'Affaires, at London. In one volume. 8vo.
- ANGELL ON LIMITATIONS.** A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty. By J. K. Angell, Esq. Third Edition, enlarged. 1 vol. 8vo.
- ANNUAL DIGEST, 1853.** Digest of Decisions of the Courts of Common Law, Equity, and Admiralty in all the Courts of the United States, and of the several States, for the year 1853. By John Phelps Putnam, Esq. 8vo.
- PRECEDENTS OF INDICTMENTS.** Precedents of Indictments, Special Pleas, etc., adapted to American Practice, with Notes containing the Law of Criminal Pleading. By Charles R. Train, and F. F. Heard, Esquires, of the Middlesex Bar. In one volume. 8vo.
- HIGHWAYS.** A Treatise on the Law of Highways, dedication of, Travellers, Travelling, &c. By Joseph K. Angell, Esquire. In one volume. 8vo.
- ENGLISH REPORTS.** Law and Equity Reports. The Common Law, Equity, Criminal, Admiralty, and Ecclesiastical Reports combined. Edited by Edmund H. Bennett and Chauncey Smith, Esq's. Vol. XXII.
- HOWARD'S REPORTS.** Vol. XV. Reports of Cases argued and determined in the Supreme Court of the United States. By Benjamin C. Howard. Vol. XV. 8vo. \$5.50.
- CUSHING'S REPORTS.** Vol. VIII. Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Luther S. Cushing. Vol. VIII. 8vo. \$5.00.

LITTLE, BROWN & Co., would respectfully call the attention of the Profession to their Edition of the British Poets, a full description of which, together with a few notices from prominent and leading journals, are herewith given.

BRITISH POETS. A Complete Collection of the British Poets, from Chaucer to Wordsworth; embracing the whole Works of the most distinguished Authors, with selections from the Minor Poets; accompanied with Biographical, Historical, and Critical Notices. Edited by F. J. Child, Boylston Professor of Rhetoric and Oratory in Harvard College.

The size and style of the volumes are those of PICKERING'S ALDINE POETS, and such of the works of that edition as fall entirely within the plan of the present collection will be embodied in it. Each separate work is sold by itself, and the price of each volume, bound in the Aldine style, or in black cloth, gilt lettered, is 75 cents. The following volumes are now ready:—

BEATTIE	1 vol.	HOOD	2 vols.
BUTLER	2 vols.	MILTON	3 vols.
CAMPBELL	1 vol.	PARNELL	1 vol.
CHURCHILL	3 vols.	POPE	3 vols.
COLLINS	1 vol.	PRIOR	2 vols.
COWPER	3 vols.	THOMSON	2 vols.
DRYDEN	5 vols.	SWIFT	3 vols.
FALCONER	1 vol.	WHITE	1 vol.
GOLDSMITH	1 vol.	YOUNG	2 vols.
GRAY	1 vol.		

"It is by far the best edition of these poets that has ever been issued in this country; fully equal to the English, of which they are an exact reprint, and at just one half the cost." *Boston Atlas*.

"We do not know any other edition of the English Poets which combine so many excellences." *Bibliotheca Sacra*.

"This series of the British Poets is the best edition we have ever seen." *Louisville Journal*.

"We regard it as the most beautiful and convenient library edition of the British Poets yet published." *Philadelphia Ev. Bulletin*.

"We have before alluded to this excellent publishing enterprise in terms of hearty commendation." *N. Y. Tribune*.

"The publishers of this edition have projected a series of the Classic Poets of Great Britain which is really astonishing, even in this age of enterprise. The magnitude of the plan will at once commend itself to general esteem. In view of the whole sweep of modern literary enterprise, we really know nothing of more importance or more worthy of the cordial support of the American public, than this Boston edition of the English Poets. . . . There is no book-shelf in the country that can afford to have the edition wanting on its shelves, without degrading its owner beneath his proper dignity as an intellectual man." *N. Y. Times*

"A fairer printed, a more tasteful, or a more valuable set of books cannot be placed in any library." *N. Y. Courier and Enquirer*.

"It is incomparably the best edition of the British Poets ever offered to the public, and should be overlooked by none collecting a library." *Southern Post*.

"All persons whose standard of home comfort embraces more than one single book-shelf, must have the British Poets in some form; and they may be sure that they will never be able to procure them in a more convenient and economical form than that which these volumes wear." *Christian Examiner*.

A T R E A T I S E

ON THE LAW OF

SALES OF PERSONAL PROPERTY,

WITH

ILLUSTRATIONS FROM THE FOREIGN LAW.

BY

WILLIAM W. STORY

SECOND EDITION.

BOSTON:

LITTLE, BROWN AND COMPANY.

1853.

L4834

Entered according to Act of Congress, in the year 1853, by
WILLIAM W. STORY,
in the Clerk's office of the District Court of the District of Massachusetts.

TO

CHARLES SUMNER, Esq..

THIS TREATISE IS INSCRIBED BY HIS FRIEND,

THE AUTHOR

ADVERTISEMENT TO THE SECOND EDITION.

IN preparing a Second Edition of the present treatise, the whole work has been thoroughly revised, and material additions have been made. It is believed that all the important cases adjudged since the publication of the previous Edition have been cited in the notes, while whatever new development or modification of principle has appeared, will be found also embodied in the text. The continental jurisprudence has been diligently examined and incorporated into its pages by way of illustration. The favor with which this work has been received by the profession has prompted the author to use his best endeavors to render it more complete and worthy of their approval, and it is earnestly hoped, that in its present form, its value as well as its bulk has been increased.

W. W. STORY.

BOSTON, 1853.

P R E F A C E .

SIR EDWARD COKE, in the preface to the 8th part of his Reports, says : “As naturalists say that there is no kind of fowl of the wood, or of the plain, that doth not bring somewhat to the building of the Eagle’s nest,—some, cinnamon, or things of price, some, juniper, or things of lesser value; so ought every man, according to his power, place, and capacity, to bring something to the adorning of our great Eagle’s nest, our own dear country;” and these presents I have brought to that great Eagle’s nest, the Law.

There is probably no portion of law, which is subject to more constant changes and additions, than that relating to Sales of Personal Property. The continual increase of commerce, not only gives birth to new questions, but materially modifies established doctrines. The doctrine of implied warranty, for instance, which is one main branch of the Law of Sales, is almost entirely the growth of very late years, and can scarcely even now be said to be settled. No treatise, therefore, which does not embody the result of the late decisions, can be at all adequate to the solution of many embar-

rassing questions relating to Sales, which are daily arising; and inasmuch as the principal treatises on this subject, which pretend to any fulness, were published at a comparatively early date, and do not contain an exposition of the law relating thereto in its present state, a work embodying the more modern doctrines and rules would seem to be needed for this, if for no other reason.

The principal English treatises on Sales of Personal Property, are those of Mr. Brown, Mr. Ross, Mr. Long, and Mr. Bell, — the first being a treatise of much merit, upon the Scottish law, and the last being a small and posthumous work by Mr. Professor Bell, containing an able sketch or outline of the Scottish law, but being merely an outline. The work of Mr. Ross was printed in 1811, and its incompleteness was the reason stated by Mr. Long for the work on the same subject, published by the latter in 1821. Mr. Long's work, however, although it has been greatly enlarged and improved by the labors of Mr. Rand, is very inaccurate and incomplete, and is, to say the least, no improvement on the work of Mr. Ross. Mr. Rand, the learned editor, in his preface to his edition of Mr. Long's work, makes much complaint of its deficiencies, and says: "By reason of the want of proper divisions of the subject in the original treatise, and of a proper classification and arrangement of the matters contained under each head, defects which could not now be remedied, it would be much better to write a new treatise, than to endeavor to supply the deficiencies of the original work." In America, no work has been written on this subject, if

we except the very able outline by Mr. Chancellor Kent, contained in his Commentaries on American Law. A full and new treatise, which shall contain an exposition of the whole body of law relating to Sales, as it now exists in America and England, and which shall elucidate and systematize the various conflicting authorities, and establish the rules of this branch of law upon the basis of principle, seems, therefore, to be greatly needed, both for the student and the practitioner. Towards such an end all my efforts have been directed in the present work, but I have not the presumption to suppose, that I have been so fortunate as to accomplish it.

Other reasons have conspired to induce the preparation of the present volume. In preparing a condensed statement of the law relating to Sales of Personal Property for a previous treatise on the law of Contracts not under Seal, I sought in vain for some treatise, which should explain the apparent confusion and contradiction of cases, which so continually embarrass the student in this branch of the law; and the doubts and difficulties, with which I was beset at every step, induced me to undertake the present task, in the hope that I might be able, in some measure, to clear up the intricacies of this subject, and reduce it to some system. One great obscurity, for instance, in which the subject is involved, is to be found in a careless use, both in the treatises and in the cases, of the term "delivery," to mean one thing, when, in fact, it means several entirely different things. And as the answer to the question, "What constitutes a delivery?" depends upon what is

meant by delivery in the particular case, and cannot be given without reference to the position of the parties, and to the object of the question, this indiscriminate use of the term must necessarily tend greatly to confuse the student as to the legal liabilities of the parties. No labor has been spared, in the present work, to clear up the obscurity on this subject; and it is hoped, that the rules in respect to delivery, herein laid down, will afford the clue to the labyrinth of apparently contradictory cases.

In the course of this volume continued reference is made to the Foreign Law, particularly to that of France, which is the most important expression of the law of Continental Europe, and to the Scottish Law which is a compound of the Roman and the Common Law. The Code, Institutes, and Digest, as well as the works of Pothier, Duranton, and Duvergier, have been studiously consulted, and to them, and the admirable treatises of Brown, Bell, and Kent, I have been much indebted. Wherever the Common Law was found to be deficient, or unfounded in principle, or a dead form, — while the Foreign Law was the reverse, I have not scrupled to give preference to the latter, in the feeling, that Law, the life of which is Right, should be above the prejudice of national boundary, and should reject its own unjust offspring in favor of the foreign children of Justice. Nor have I hesitated to challenge all rules, which seemed devoid of principle, and to use my best argument against them. Perhaps it would seem, to some persons, more becoming, had I omitted such argument; but believing that it is the duty of

every legal writer to endeavor, in so far as in him is, to remove from the law every reproach and blemish, and to establish it upon the eternal basis of Justice and Right, I have not felt at liberty to omit my testimony against whatever has seemed to be merely arbitrary and unjust. For, as was well said by Lord Bacon, the debt a man owes to his profession is best performed, if he "be able to visit and strengthen the root and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in profession and substance." And I also, a humble follower after that great mind, have come to the study of the laws "with a mind and a desire, that the same laws should be better for my industry."

He who, when this work was begun, was at my side to help and encourage me, is now no longer among the living. His eyes have never beheld even a written line, and one of my greatest rewards is denied me. After his dear countenance was hidden from me, and his spirit had passed beyond this earthly horizon, like the full-orbed sun at the close of a long serene day, only the twilight of memory was left in which to finish my task. Then, alone, without his cheering presence to enlighten me, but yet in obedience to his living wishes, I have finished to his memory what I began for his delight.

W. W. STORY.

Boston, February 12, 1847.

C O N T E N T S .

CHAPTER I.

OF THE NATURE OF A CONTRACT OF SALE	.	.	SECTION 1
-------------------------------------	---	---	--------------

CHAPTER II.

OF THE PARTIES TO A CONTRACT OF SALE	.	.	.	2
Idiots and Lunatics	.	.	.	10
Drunkards	.	.	.	15
Outlaws and Persons attainted	.	.	.	17
Aliens	.	.	.	18
Infants	.	.	.	20
Married Women	.	.	.	40
Seamen	.	.	.	67
Slaves	.	.	.	68

CHAPTER III.

OF CONTRACTS OF SALE BY AGENTS	.	.	.	70
Auctioneers	.	.	.	79
Brokers	.	.	.	88
Factors	.	.	.	91
Ships' Husbands	.	.	.	108
Masters of Ships	.	.	.	109
Partners	.	.	.	119

CHAPTER IV.

MUTUAL ASSENT OF THE PARTIES	.	.	.	124
Duress	.	.	.	140
Mistake	.	.	.	141
Fraud	.	.	.	158

CHAPTER V.

	SECTION.
THE SUBJECT OF SALE	183

CHAPTER VI.

THE PRICE	216
---------------------	-----

CHAPTER VII.

OF THE DIFFERENT SPECIES OF CONTRACTS OF SALE	227
Express and Implied Contracts	229
Executed and Executory Contracts	231
Entire and Severable Contracts	240
Conditional Contracts	246

CHAPTER VIII.

OF THE STATUTE OF FRAUDS AS APPLICABLE TO A CONTRACT OF SALE	254
---	-----

CHAPTER IX.

OF THE LIEN OF THE SELLER	281
-------------------------------------	-----

CHAPTER X.

OF DELIVERY	294
-----------------------	-----

CHAPTER XI.

OF STOPPAGE IN TRANSITU	318
-----------------------------------	-----

CHAPTER XII.

OF WARRANTY	348
-----------------------	-----

CHAPTER XIII.

DUTIES AND RIGHTS OF THE PARTIES TO A CONTRACT OF SALE	386
Rights and Duties of a Vendor	387
Rights and Duties of a Vendee	403

CHAPTER XIV.

	SECTION
OF RESCINDING THE CONTRACT OF SALE	415

CHAPTER XV.

OF THE REMEDIES FOR A BREACH OF THE CONTRACT OF SALE, AND THE DAMAGES RECOVERABLE	429
--	-----

CHAPTER XVI.

SALES BY AUCTION	459
----------------------------	-----

CHAPTER XVII.

OF ILLEGAL AND FRAUDULENT SALES	485
Sales <i>contra bonos mores</i>	488
Sales against public policy	489
Sales in violation of a statute	489
Sales to an enemy during war	503
Sales of smuggled goods	507
Fraudulent sales	510
Voluntary assignments by creditors	512
Sales where the vendor retains possession . .	518

INDEX TO CASES CITED.

(The references are to the sections.)

A.	SECTION		SECTION
Abbot v. Bayley	47, 50, 51	Allen v. Sugrue	114
Abbott v. Hermon	229	Alexander v. Alexander	75
Abbotts v. Barry	293, 401, 420, 446, 456	——— v. Comber	260
Abeel v. Radcliff	269	——— v. Deneale	526
Acebal v. Levy	221, 222, 229, 269, 270, 276	——— v. Gardner	433
Adam v. Richards	138, 405, 408, 422, 456	——— v. Gibson	350
——— v. Richards	455	Alford v. Egglisfield	76
Adams v. Banhart	120	Allaire v. Ouland	72, 470
——— v. Gay	502	Alna v. Plummer	267, 468
——— v. Lindsell	129, 130	Alterbung v. Fairmaner	361
——— v. Minick	314, 391, 402, 436	Am. Ins. Co. v. Center	114, 115, 116
——— v. Paige	169	Ancher v. Bank of England	144
——— v. Wheeler	526	Anderson v. Fuller	526
Adamson v. Jarvis	367	——— v. Hill	360 b
Adderley v. Dixon	155	——— v. Hodgson	279, 305, 390, 398
Addison v. Gandasequi	93	——— v. Roberts	446
Ainslie v. Medlycott	165	——— v. Scott	311, 312
Adamson v. Jarvis	72, 357, 470, 481	——— v. Stewart	484
Akerman v. Humphery	340, 344	——— v. Still	169
Albany Dutch Church v. Brad- ford	251	——— v. Tompkins	119, 120
Albrecht v. Sussman	19	Andrews v. Kneeland	90
Alcorn v. Westbrook	236	Angel v. McLellan	36, 37
Aldis v. Chapman	64	Appleby v. Dods'	240
Aldrich v. Albree	307	Appleton v. Campbell	488
Allen v. Addington	173	Arbuckle v. Cowton	492
——— v. Denston	350	Archer v. Marsh	494
——— v. Bennett	266, 272	Armstrong v. Baldock	518
——— v. Ford	447	——— v. Gilchrist	77
——— v. Hammond	149, 367, 423	——— v. Percy	454
——— v. Gripper	332, 401	——— v. Toler	72, 159, 208, 506, 507
——— v. Johnson	526	Arnold v. Hickman	15
——— v. Ogden	71	Arnott v. Biscoe	181, 343
		——— v. Boulter	287
		Ashton v. White	173
		Ash v. Putnam	446
		——— v. Savage	526
		Ashfield v. Ashfield	30
		Astley v. Emery	276, 279, 469

	SECTION		SECTION
Astley v. Reynolds	140	Banks v. Thomas	518
Atkin v. Barwick	124, 324	Barber v. Taylor	251
Atkins v. Curwood	53, 56	Barclay v. Tracy	243
Atkinson v. Barnes	303, 388	Baring v. Corrie	85, 88, 89, 91, 93
——— v. Bell	233, 234, 316, 320, 433	——— v. Lyman	119
——— v. Maling	288, 290, 311, 312, 392, 398	Barker v. French	525, 526
Atkins v. Amber	97, 471	——— v. Marine Ins. Co.	79, 476
Atlee v. Backhouse	140	Barnard v. Yates	368
Attorney-General v. Parnter	10	Barnes v. Bartlett	201, 387, 446
——— v. Siddon	202	——— v. Freeland	324
Attwood v. Munnings	70	Barney v. Brown	312
Attwood v. Small	169, 170, 172	Barr v. Hatch	526
Austin v. Bell	514, 516	Barrera v. Alpuente	21
——— v. Craven	296, 340, 449	Barrett v. Baxton	15
——— v. Patten	28	——— v. Goddard	287, 296, 332, 339, 398, 401
Averill v. Hedge	129, 103	——— v. Pritchard	313, 403
Avery v. Halsey	72	Barry v. Coombe	272
Aubert v. Maze	506	Bartlett v. Emery	39
Ayer v. Bartlett	432	——— v. Portland	89
		——— v. Purnell	463, 468
		——— v. Vinor	486, 496
		——— v. Williams	526
		Barstow v. Gray	467
		Barton v. Boddington	341, 312
		Bartram v. Farebrother	324, 332
		Barwick v. Reade	494
		Bassett v. Collis	362
		Baston v. Butter	403, 441
		Bates v. Conkling	287
		Batturs v. Sellers	266
		Batty v. Carswell	74
		Baum v. Stevens	360
		Bayard v. Malcolm	360, 364, 367
		Baylor v. Smithers	526
		Baxter v. Earl of Portsmouth	10, 14
		Beal v. McKiernan	87
		Beall v. Joseph	68
		——— v. Williamson	526
		Beals v. Terry	136, 357
		Bean v. Morgan	47
		Beard v. Webb	49
		Beattie v. Robin	526
		Becker v. Vrooman	367
		Beckwith v. Corral	192
		Beebee v. Robert	276, 395
		Beecker v. Vrooman	425, 427
		Belchier v. Parsons	74
		Bell v. Cunningham	77
		——— v. Gardiner	146
		——— v. Quin	496
		Belworth v. Hassell	462
		Bennet v. Francis	446
		——— v. Hull	239, 260
		——— v. Wade	182
		Bensley v. Bignold	468

	SECTION		SECTION
Benson v. Lamb	310, 424	Botlingtk v. Inglis	306, 325, 333, 336
Bentall v. Burn	276, 278, 278 b, 311, 312	Bolden v. Brogden	362
Bentley v. Griffin	56, 57, 60	Bolton v. Prentice	65
Benton v. Pratt	173	Bonsfield v. Creswell	89
—— v. Thornhill	521	Boone v. Eyre	424
Berkley v. Watling	344, 346	Boorman v. Johnston	376, 395, 427
Bernard v. Read	508	—— v. Nash	274, 320, 436, 438, 449, 456
Berry v. Young	367	Borradaile v. Brunton	448, 454
Best v. Joly	504	Borrekins v. Bevan	358, 377
—— v. Osborne	362	Borrinsale v. Greville	36
Betts v. Gibbins	342	Boulton v. Arnott	274, 436, 457
Bexwell v. Christie	79, 169, 473, 482	—— v. Dobree	19
Biddes v. James	499	Bourne v. Gatliffe	307, 309
Biddle v. Levy	200, 446	Bower v. Jones	72, 470
Biggs v. Lawrence	508	Bowker v. Hoyt	424
Billard v. Hayden	505	Bowrie v. Bennett	206, 488
Binnington v. Wallis	488	Boyd v. Bosset	367
Binns v. Towsey	514	—— v. Crawford	371
Birch v. Depeyster	269, 467	—— v. Emerson	120
Bird v. Boulter	80, 82, 267, 268, 468	—— v. Lett	309
—— v. Jones	62	—— v. Siffkin	232, 247, 249
Bishop v. Shillitto	313, 403	Boydell v. Drummond	258, 270, 272
Bissell v. Hopkins	518, 524, 526, 529	Boynton v. Hubbard	160
Bixby v. Whitney	307	—— v. Page	500
Bize v. Dickason	144	Boys v. Ayerst	257
Blackburn v. Mackey	36	Boyson v. Coles	104, 106, 202
Blackford v. Christian	11, 182	Brackett v. Norton	229
—— v. Preston	494	Bradbury v. Anderton	200, 446, 447, 509
Blackmore v. Shelby	186	Braddock v. Watson	516
Blades v. Tree	56	Bradford v. Manly	245, 272, 354, 376, 395
Blake v. Cole	258	Bradley v. Bosley	166, 171, 420, 458 a
Blakey v. Dinsdale	305	Bradshaw v. Bennett	463
Blasdale v. Babcock	367	Bragg v. Cole	244, 424, 439, 449, 451
Blenkinsop v. Clayton	273, 276, 311, 312	Bramley v. Alt	181, 482
Bliss v. Negus	504	Brander v. Phillips	97, 98
Bloodgood v. Goodrich	77	Branston v. Robins	144
Blöt v. Boiceau	98	Brashear v. West	514
Blower v. Sturtevant	64	Breckenbridge v. Ormsby	13
Bloxam v. Morley	312, 449	—— v. Anderson	526
—— v. Sanders	279, 284, 289, 290, 291, 292, 300, 303, 311, 319, 340, 388, 398, 400, 449, 469	Brenton v. Davis	371
Bloxsome v. Williams	500, 502	Bret v. J. S. and his wife	504
Bluett v. Osborne	179, 368, 369, 395, 403, 441	Brett v. Pretymann	127
Blunden v. Baugh	26	Bridge v. Cage	504
Blunett v. Bedford Bank	513	—— v. Waive	148, 358, 377
Blydenburgh v. Welsh	179, 382, 396	Bridges v. Berry	219
Boardman v. Keeler	526	Briggs v. Parkman	526
Bobo v. Hansell	30	Bright v. Eynon	485
Boggett v. Frier	46	—— v. Boyd	28, 75
		Brinley v. Spring	276, 526
		—— v. Tibbits	427, 446

	SECTION		SECTION
Carruthers v. Payne	233, 234, 316	Chesterman v. Lamb	138, 408
Carter v. Carter	245, 249		436, 454
—— v. James	185, 186	Child v. Hardyman	64, 65
Cary v. White	113	—— v. Monins	76
Casamajor v. Strode	204, 243, 387, 407, 423	Chism v. Wood	367
Case v. Hall	203, 367, 423	—— v. Woods	201
Cash v. Giles	427	Christy v. Cummins	417 a
Cason v. Cheeley	260, 262	Church v. Marine Ins. Co.	476
Caster v. Touissant	276, 278, 279, 312, 469	City Council v. Van Roven	49
Caswell v. Coare	138, 408, 454	Clannez v. Perrey	403, 441, 458
—— v. Ware	454	Clap v. Smith	500
Catlin v. Ball	103	Clapman v. Moyle	185
—— v. Bell	74, 103, 473, 480, 507, 508	Clare v. Bedford	28
—— v. Evans	120	—— v. Maynard	416, 454
Caudell v. Shaw	49	Clark v. Baker	242, 244, 405, 448, 454, 456 a, 457
Cave v. Coleman	357	—— v. Dutcher	144
Caving v. Westley	121	—— v. Gandace	360, 453 a
Cazeton v. Leighton	186	—— v. Hutchins	305
Cecil v. Juxon	50	—— v. Mass. Fire and Marine Ins. Co.	116
Chamberlain v. Hewitson	51	—— v. Moody	92
—— v. Twyne	519	—— v. Periam	488
Chambers v. Griffith	152, 204, 213, 367, 387, 407	—— v. Pinney	449
Champion v. Plummer	257, 266, 466, 467	—— v. Protection Ins. Co.	486, 596
—— v. Short	136, 245, 311, 424	—— v. Shee	192, 506, 507, 508
—— v. Terry	442	—— v. Tucker	276 a
Champlin v. Rowley	215 a	—— v. Van Northwick	95
Chancellor v. Wiggins	367	Clarke v. Gobley	28
Chandelor v. Lopus	148, 277, 432, 360, 461, 377	—— v. Havens	499
Chandler v. Thurston	240	—— v. Spence	233, 234, 290, 295, 315, 316
Chanter v. Hopkins	368, 372, 395	—— v. Tipping	102
Chapel v. Hicks	439	Clark's Ex'ors v. Riemsdyk	77
Chaplin v. Rogers	276, 278, 311, 312, 392, 398	Clason v. Bailey	87, 266, 267, 467
Chapman v. De Tastet	72, 470	Clay v. Harrison	320
—— v. Durant	218	Clayton v. Andrews	232, 239, 260
—— v. Lathrop	303, 338	—— v. Anthony	526
—— v. March	357	Cleaves v. Foss	468
—— v. Partridge	267	Clinan v. Cooke	272
—— v. Rogers	287	Clow v. Woods	526
—— v. Searle	219, 287, 339, 397	Clowes v. Brooke	34
Charters v. Bayntun	36	Clute v. Robison	367
Chase v. Westmore	283	Coan v. Bowles	21
Chater v. Becket	504	Coales v. Railton	335
Chatfield v. Paxton	146	Coates v. Lewis	89
Chedworth v. Edwards	74	—— v. Railton	336, 401
Cheshire v. Barrett	30	Coates v. Stephens	562
Chesman v. Nainby	493	Coburn v. Pickering	526
Chesterfield v. Janssen	160, 167, 494, 514	Cochran v. Cummings	165
		—— v. Irlam	101, 103, 106
		Cocke v. Campbell & Smith	350
		Cockshott v. Bennett	29
		Codwise v. Hacker	77
		Coggs v. Bernard	371
		Cohen v. Paget	72, 470

	SECTION		SECTION
Coil v. Willis	303	Cornfoot v. Towke	165
Cole v. Kerr	297 a, 394	Corning v. Colt	126
Cole v. Dyer	257	Cornwall v. Wilson	74, 102
Colcock v. Reid	367	Corpe v. Overton	25
Coles v. Coles	119, 120	Cory v. Gertcken	28
— v. Trecothick	79, 267, 272, 470, 475	Coslake v. Till	310
Colley v. Merill	97	Cothay v. Tate	305, 390
Collins v. Blantern	488	Courcier v. Ritter	70, 99, 100
— v. Brush	526	Cousin v. Paddon	439
— v. Dennison	165	Coventry v. Barton	470
— v. Evans	169	Covill v. Hill	201
— v. Martin	106	Cowas-jee v. Thompson	322
Colthard v. Pancheon	353	Cowie v. Remfry	87
Columbian Ins. Co. v. Lawrence	102	Cowden v. Brady	526
Colt v. Netterville	263	Cowper v. Andrews	303, 388
Comm v. Clements	68	Cowley v. Dunlop	229
Comstock v. Raybord	526	Cox v. Harden	331, 345
Commonwealth v. Harnden	79, 475	— v. Prentice	154
— v. Harrison	32	Coxe v. Harden	306, 344
— v. Murray	32	Crantz v. Gill	36, 37
Comyns v. Boyer	486	Crawford v. Hunter	102
Conard v. Atlantic Ins. Co.	160, 332, 344, 518, 524, 535, 529	— v. Morrell	504
Conner v. Henderson	148, 245, 427, 431, 455	— v. Wilson	370
Conolly v. Parsons	181, 482	— v. The Wm. Penn	503
Conroe v. Birdsall	28	Crawshay v. Eades	342, 401
Conway v. Bush	225, 303, 403, 449	— v. Homfray	285, 292
Conyers v. Ennis	176, 179, 200, 384, 387, 446, 510	Cripp v. Golding	504
Cook v. Hartley	419	Cripps v. Reade	367
— v. Museley	361, 395	Crisp v. Churchill	206, 488
— v. Final	453 a	— v. Gamel	504
Cooke v. Clayworth	15	Crofoot v. Bennet	296, 298 a
— v. Deaton	34, 36	Croft v. Arthur	526
— v. Oxley	40, 126, 130	Crook v. Jadis	192, 193
Coolidge v. Brigham	245, 367, 405, 426, 427, 456, 456 a	Crooks v. Moore	436 a, 457 a
Coombs v. Emery	499	Crookshank v. Burrell	239, 260, 260 a
Cooper v. Chitty	412	Crosby v. Wardsworth	260, 262
— v. Elston	239, 260, 280	Cross v. Peters	176, 200, 387, 446
— v. Smith	222, 269, 270	— v. Gardiner	123, 364, 367, 481
Cope v. Rowlands	486, 497, 498	Crowder v. Austin	482
Copeland v. Lewis	305	Crull v. Dodson	263
— v. Merchants' Ins. Co.	77, 476	Crymes v. Day	23
Copis v. Middleton	221, 512	Cud v. Rutter	186
Coppin v. Craig	73, 97, 479	Cumberland Bank v. Hann	526
— v. Walker	73, 97, 479	Cuming v. Brown	344, 345
Corbett v. Brown	167, 173	Cumming v. Roebuck	87, 267
— v. Poelnitz	61	Cunningham v. Freeborn	526
Corlies v. Gardner	313	— v. Kimball	420
Cormack v. Gillis	422	Cunningham's Heirs v. Cun- ningham's Ex'ors	478
Cornelius v. Molloy	119, 165, 377	Curling v. Shuttleworth	475
Corey v. Corey	15	Currier v. Currier	307
		Curtis v. Hannay	184, 203, 421, 423
		— v. Ingham	219
		— v. Price	513
		— v. Pugh	276 a

	SECTION		SECTION
Cutler v. Powell	229, 240	Defreeze v. Trumper	364, 367, 368
Cutter v. Copeland	526	Denew v. Daverill	79, 470
D.		Dennis v. Alexander	296
D'Aquila v. Lambert	318	Dent v. Bennet	10
D'Arcy v. Lyle	470	Descadillas v. Harris	219
Dalby v. Pullen	204, 367	Descard v. Bond	280
Dalton v. Irvin	72, 470	Dey v. Dox	274, 436, 438
— v. Irwin	86	Dick v. Lumsden	347
Dame v. Baldwin	188, 199, 201, 387	Dickinson v. Gapp	358
Damer v. Langton	424	— v. Hall	427
Damon v. Osborne	296	— v. Lilwal	267
Dana v. King	251	— v. Naul	471
— v. Boyd	354	Dilk v. Keighley	30, 38
Dane v. Kirkwall	11, 13, 14	Dimmick v. Lockwood	458
Danew v. Daverill	74, 473, 479	Dingley v. Robinson	485
Danforth v. Davey	245	Dixon v. Baldwin	305, 335, 336, 390, 398, 401, 421
Daniel v. Adams	71, 473	— v. Hort	244
— Mitchell	137, 165, 166, 360, 383, 462	— v. Yates	283, 287, 289, 290, 319, 340, 342, 398, 399, 401
Darby v. Boucher	23, 24, 37, 38	Doane v. Eddy	526
Dartnall v. Howard	74	Dobel v. Stevens	137, 360, 396
Daubigny v. Duval	104, 106	Dobell v. Hutchinson	272, 462, 467
David v. Adams	79	Dodge v. D'Wolf	70
Davies v. Acocks	514	— v. Tileston	72, 92
— v. Powell	211	Dodsley v. Varley	277, 289, 290, 291, 312, 311, 400
Davis v. Garrett	76	Dodson v. Varley	289
— v. Fish	455	— v. Wentworth	335
— v. Maxwell	240	Doe v. Roberts	485, 518
— v. James	306	— v. Routledge	513
— v. Mason	492	— v. Stanion	367
— v. Meeker	169	Doggett v. Emerson	360, 374, 383
— v. Oswell	449	Dole v. Stimpson	278
— v. Shields	87, 267	Donaldson v. M'Roy	454
— v. Street	424	Donath v. Broomhead	337 b, c
Day v. Cox	449, 457	Donelson v. Young	427
— v. Nix	203, 425	Doolin v. Ward	484
Deady v. Harrison	159, 485, 518	Dorr v. Fisher	363 a, 455
Deal v. Mason	370	Dorsey v. Jackman	367
Deale v. Leave	36	Douglas v. McAllister	448, 449
Dean v. Richmond	51	— v. Spears	467
De Bardeleben v. Beekman	526	Dowding v. Mortimer	364
De Bagnis v. Armistead	486, 496	Down v. Halling	192
De Bouchout v. Goldsmidt	70, 104	Downes v. Gazebrook	476
De Forest v. The Fulton Ins. Co.	102	Downs v. Ross	260, 260 a
De Gaillon v. L'Aigle	50	Dr. Compton's Case	236
De Mannville v. Compton	165	Drewe v. Hanson	205, 243, 423
De Sewhanberg v. Buchanan	170, 171, 360	Drinkwater v. Goodwin	72, 93, 94, 97
De Symons v. Minchwick	170, 236, 237, 443	Drummond v. Burrell	258
De Tastet v. Crousillat	70	Drury v. Defontaine	486, 496, 500
De Valengin v. Adm's Duffie	96	Dubose v. Wheddon	39
Dee v. Shee	499	Ducarrey v. Gill	70
Deerly v. The Duchess of Mazarine	58	Duckett v. Williams	131
		Dudley v. Little	484
		Duff v. Budd	306

	SECTION		SECTION
Duke of Norfolk v. Worthy	165, 420	Elliott v. Thomas	261
Duncan v. Blundel	371	Ellis v. Chinnock	138, 408, 454
—— v. McCullough	485	—— v. Hunt	234, 296, 337, 338, 399, 401
Dundas v. Duters	513	—— v. Mortimer	128, 247, 250
Dunmore v. Taylor	232	—— v. Turner	71
Dunlop v. Higgins	129, 134, 412, 455	Ellison v. Ellison	514
Dunnage v. White	10, 11, 13	Elmore v. Kingscote	222, 269, 270, 467
Dunscombe v. Tickridge	37	—— v. Stone	270, 287, 339, 398
Dusar v. Perit	74	Elton v. Larkins	181
Dutton v. Solomonson	236, 305, 306, 390, 398, 434, 442, 444	Emerson v. Healis	79, 80, 241, 243, 262, 267, 464, 465
Dwight v. Whitney	95	Emery v. Emery	64
D'Wolf v. Babbitt	313, 400	Emmett v. Norton	62, 66
—— v. Harris	518, 525	Emanuel v. Dane	410, 422
Dyer v. Hargrave	354, 360	Escott v. Milward	93
—— v. Pearson	190, 202	Esbridge v. Glover	126
Dykes v. Blake	462, 464	Ess v. Trescott	79, 475
E.		Estwick v. Caillaud	514
Eagleton v. East India Co.	463	Etheridge v. Binney	95, 120
Earl of Bath v. Montague's Case	157	Etherington v. Parrott	56
—— of Bristol v. Wilmore	176, 293, 401, 510	Etting v. Bank of U. S.	179
—— of Buckinghamshire v. Drury	25, 26, 28	Evans v. Potter	95, 100, 102, 104, 106
—— of Portmore v. Taylor	186	Everett v. Coffin	181, 188, 201, 387
Earle v. Peale	23, 24, 37, 38, 55	—— v. Desborough	181
—— v. Rowcroft	109	Ewers v. Hutton	65
Easly v. Crockford	192	Eyre v. Dunsford	173
East India Co. v. Donald	157	F.	
—— v. Tritton	144	Fair v. McIver	283
—— v. Hensley	71, 91	Farebrother v. Ainsly	73
—— v. Neave	491	—— v. Simons	80, 267, 268, 468
Eastwood v. Brown	521	Farina v. Home	276, 278, 278 b
Eddy v. Stafford	236, 441	Farmer v. Davies	113
Edmond v. Caldwell	96	—— v. Russell	208, 506, 507
Edwards v. Brewer	285, 318, 320, 327, 333, 336	Farnsworth v. Sarrard	441
—— v. Harben	160, 518, 526	—— v. Shepard	526
—— v. Hodding	83, 474, 478	Farnam v. Brooks	11, 182
—— v. Golding	73	Farr v. Ward	442, 443
Ege v. Kcontz	144	Farrer v. Hutchinson	121
Egerton v. Matthews	257, 266, 276, 467	—— v. Nightingale	155, 184, 203, 367, 407, 423, 448
Egleston v. Macaulay	451	Farries v. Stein	132
Eicke v. Meyer	72, 470	Faulder v. Silk	13
Ekins v. Macklish	70	Faulkner v. Perkins	526
Eland v. Carr	283	Favenc v. Bennett	89
Elason v. Henshaw	136	Faxon v. Mansfield	240
Elkins v. Tresham	364	Featherston v. Hutchinson	504
Ellard v. Llandaff	180	Feise v. Wray	285, 323, 324, 327, 398, 399
Elliott v. Davis	120	Fellowes v. Lord Gwyder	167
—— v. Boaz	165		
—— v. Heginbotham	312 a		

	SECTION		SECTION
Fenn v. Harrison	70, 72, 202, 350, 387, 446, 480	Forster v. Frampton	332, 336, 338, 401
Fennell v. Rider	500, 502	—— v. Pearson	193
Fenton v. Browne	169	Fowle v. Freeman	272
—— v. Emblers	258	Fowler v. Kymer	336
—— v. Hollway	15	—— v. M'Taggart	306
—— v. Pearson	323	Fox v. Hembury	119
Ferguson v. Carrington	176, 380, 420, 434, 442, 444, 446, 447, 449, 485, 510	—— v. Mackreth	157, 174, 175, 381, 458
—— v. Norman	493	Fraley v. Bispham	358
—— v. Oliver	417 a	Franco v. Bolton	488
Ferrey v. Baxter	219	Franklyn v. Lamond	243
Fielder v. Starkin	138, 405, 408, 409, 427, 448, 454, 455	Franklin v. Miller	324
Fielding v. Kymer	504	Frazer v. Hilliard	186, 287, 300
Filson v. Himes	504, 506	Freeman v. Baker	360
Finch v. Blount	449	—— v. Boynton	144
Fisher v. Jewett	14, 39	—— v. Chote	239, 341, 421, 422, 456
—— v. Samuda	368, 405, 427, 455	—— v. East India Co.	116
Fitts v. Hall	28	—— v. Pasley	357
Fitzgerald v. Peck	144	French v. Backhouse	102, 108
Fitzhugh v. Dennington	20	Frisbee v. Hoffnagle	203
Fitzherbert v. Mather	71	Frothingham v. Iverton	98
Fitzsimmons v. Joslin	165	Fry v. Hill	442
Fix v. Lambson	68	Fullagar v. Clark	160
Flack v. Tollamache	36	Fuller v. Abraham	462
Flarty v. Odium	494	Furnis v. Leicester	364, 367, 423
Fleming v. Townsend	526	—— v. Smith	27
Fletcher v. Bowsher	166, 396		
—— v. Howard	526		G.
—— v. Peck	231		
—— v. Walker	74	Gaby v. Driver	83, 488
Flight v. Bolland	266, 467	Gailbraith v. White	370
—— v. Booth	165, 420, 462	Gainsford v. Carroll	412, 438, 449
Flindt v. Waters	19	Gale v. Comber	92
Flinn v. The Leander	68	—— v. Leckie	488
Foggart v. Blackwiller	360	Gallagher v. Brunel	173
Fores v. Johnes	206, 488	—— v. Waring	368, 376, 395
Foster v. Estate of Caldwell	360	Gambling v. Read	276
Foster v. Pugh	526	Garbett v. Watson	239, 260, 260 a
—— v. Swasey	169, 170, 171	Gardiner v. Corson	252
Fontain v. Phoenix Ins. Co.	114	—— v. Grey	148, 179, 358, 368, 376, 377, 395
Forbes v. Parker	518	—— v. Howland	276
Ford v. Fothergill	36	Gardner v. Jay	260
—— v. Phillips	30, 31	Garland v. Chambers	526
—— v. Sheldon's Case	263	Garment v. Barrs	362
—— v. Yates	269	Garrard v. Zachariah	307, 391
Forrestier v. Bordman	70, 77, 95, 473	Gartside v. Isherwood	11
Forster v. Fuller	76	Gas Light Co. v. Turner	506
—— v. Taylor	207, 496, 497	Gaters v. Madeley	40
Forsythe v. Ellis	199	Geer v. Putnam	500
Forth v. Stanton	224	George v. Clagett	93, 94
Fortune v. Leagham	421	—— v. Kemble	446
Foster v. Charles	165, 167, 173	—— v. Stubbs	512, 517 a

	SECTION		SECTION
Gentry v. McMinnis	68	Gram v. Seton	120
Germain v. Burton	138, 408, 454	Grant v. Thompson	11
Gibbons v. Caunt	144	—— v. Vaughan	192, 199, 387
Gibson v. Jeyes	186	—— v. Welchman	425
Giles v. Edwards	424, 448	Grantham v. Hawley	185, 186
Gill v. Cabitt	192	Graves v. White	165
Gillespie v. Moore	367	Gray v. Cox	368, 371, 395
Gillet v. Mawman	235, 317	—— v. Gutteridge	83, 474, 478
Gillet v. Peppercorn	476	—— v. Handkinson	203
Gilpins v. Consequa	240, 449	—— v. Matthias	488
Gimson v. Woodfall	195	Greaves v. Ashlin	274, 402, 404, 409, 428, 450
Girard v. Taggart	79, 82, 314, 402, 428	—— v. Ashton	128
Girardy v. Richardson	488	—— v. Hepke	287, 312, 339, 340, 398
Givens v. Colder	272	Greely v. Bartlett	95
Glen v. Hodges	68	Green v. Greenbank	454
Gloucester Bank v. Salem Bank	146	—— v. Haythorne	287, 339, 398
Glover v. Austin	515	—— v. Sperry	28
—— v. Ott	36	—— v. Royal Exch. Ins. Co.	114
Glynn v. Baker	199, 387	Greene v. Bateman	151, 459
Gober v. Gober	68	Greenleaf v. Cook	203
Goddard v. Merchants Bank		Gregory v. McDowel	274, 436, 438, 457
Godin v. London Ass. Co.	97	—— v. Paul	47, 50
Godfrey v. Furzo	96	—— v. Pierce	47
Goldsbury v. May	526	—— v. Stryker	233, 235
Gonzales v. Sladen	76	Greening v. Wilkinson	448, 449
Gomery v. Bond	141	Greenleaf v. Cooke	203, 387
Gompertz v. Denton	421, 431, 454	Gremare v. Le Clerc Bois Valon	486
Goodall v. Skelton	274, 389, 428	Gresham v. Postan	364
Goode v. Harrison	30	Grey v. Pearkes	513
—— v. Langley	233, 315	—— v. Stewart	484
Goodenow v. Tyler	70, 95, 96	Griffith v. Ingledew	344
Goodheart v. Lowe	323	—— v. Spratley	224
Goodman v. Eastman	173	—— v. Foster	199
—— v. Layers	144	Grimaldi v. White	426, 427, 455
Goodsell v. Myers	23, 39	Grimman v. Legge	240
Goodwin v. Holbrook	307, 308, 391	Griswold v. Waddington	19, 503
—— v. Morse	203	Grogan v. Cooke	513
Gordon v. Cameron	288, 398	Groning v. Mendham	306, 405, 427
—— v. F. & M. Ins. Co.	114	Grounsell v. Lamb	417, 439
Gordon v. Martin	431	Grove v. Dubois	92
—— v. Mass. F. and M. Ins. Co.	111, 115	—— v. Nevill	28
Gordon v. Sims	468	Groves v. Buck	260, 260 a
Gordon v. Swan	230, 236	Grover v. Wakeman	514
Goss v. Neal	516	Guerreiro v. Peile	71, 103
—— v. Richardson	337	Gulick v. Ward	484
—— v. Turner	358	Gunnis v. Erhart	79, 463, 480
Gould v. Gould	160	Guthrie v. Murphy	36
Goupy v. Harden	107		
Govier v. Hancock	62, 65		
Gowen v. Von Dedalzen	371		
Graham v. Dyster	98, 104, 106		
—— v. Jackson	244		
—— v. Oliver	155, 203, 205, 367, 387, 423, 448		
		H.	
		Haidee v. Grant	62
		Hagedorn v. Laing	436, 463

	SECTION		SECTION
Haggarty v. Palmer	313	Harvey v. Norton	60
Hale v. Huntley	296	—— v. Young	364, 367
Halsley v. Grant	407	Harvy v. Gibbon	251
Hall v. Conolly	36	Harwood v. Lester	305
—— v. Franklin Ins. Co.	114, 115	—— v. Heffer	64
—— v. Mullin	68	Hasleman v. Young	119
—— v. Odber	442	Hastings v. Baldwin	514, 516
—— v. Warren	10	—— v. Lovering	358, 368, 395
Ham v. Toovey	62	Haswell v. Hunt	303, 388
Hamilton v. Russell	160, 518, 525	Hatch v. Smith	515, 516
—— v. Lycoming	130	Hatchett v. Baddeley	51
Hamar v. Alexander	173	Haven v. Foster	144
Hamlin v. Stevenson	20	—— v. Low	526
Hammond v. Allen	462	Hawes v. Humble	247, 249
—— v. Anderson	285, 290,	—— v. Reader	516
311, 340, 342, 401		—— v. Watson	289, 340, 342,
—— v. Barclay	97	—— v. Weston	399
—— v. Holiday	72, 86, 92,	Hawkes v. Dunn	282
	470	Hawkins v. Appleby	323
Hanford v. Archer	526	—— v. Campbell	172, 432, 447
—— v. McNair	77	—— v. Campbell	360 b
Hands v. Slaney	33, 34	Hawse v. Crowe	293, 401, 420
Hanney v. Eve	159, 485	Hawshaw v. Parkins	120
Hansard v. Robinson	412	Haycraft v. Creasy	173
Hanson v. Armitage	276, 469	Hayden v. Stoughton	248
—— v. Meyer	287, 296, 299,	Hayman v. Molton	114
300, 340, 389, 398		Hayward v. Scougall	232, 247
—— v. Roberdeau	81, 83, 478,	Heacock v. Walker	188, 199, 201
	480	Heeman v. Vernoy	367
Hapgood v. Batcheller	95, 96	Helps v. Glenister	207, 496, 499
Hardacre v. Stewart	470, 480, 481	—— v. Winterbottom	434, 442
Hardy v. Metzgar	199	Helyear v. Hawke	72, 350, 351
Harelock v. Geddes	439	Henderson v. Bainwall	80, 87, 88,
Haretop v. Hoare	188, 201, 387		89, 90, 103, 267,
Harman v. Anderson	276, 289, 311,	—— v. Mabry	468
312, 340, 392, 401		—— v. Sevey	377
—— v. Fisher	324, 421	Hendley v. The Marquis of	
Harmar v. Killing	30, 31	Westmeath	64, 66
Harrington v. Wells	420	Hendricks v. Robinson	514
Harris v. Lee	55	Henshaw v. Robins	355, 357, 358,
—— v. Morris	65		354, 360
—— v. Smith	303, 388, 400	Herbert v. Champion	144
—— v. Sumner	516	Hermance v. Vernoy	367
Harrison v. Allen	441	Heron v. Granger	443
—— v. Fane	33, 34, 36	Hervey v. Young	169
—— v. Jackson	120	Hetherington v. Graham	62
—— v. Sterry	120	Hewison v. Guthrie	292
Hart v. Hammett	358 a, 361	Heyward v. Young	492
—— v. Miles	244	Heywood v. Waring	283
—— v. Nash	273 b	Hibbert v. Shee	376, 395
—— v. Prater	34	Hickling v. Hardy	444
—— v. Ten Eyck	98	Hicks v. Minturn	479
—— v. Wright	368	Hiern v. Mill	190
Hartley v. Pephall	407	Highmore v. Molloy	85
Hartness v. Thompson	21	Hiler v. Buckley	423
Harvey v. Grabham	269		
SALES.	c		

	SECTION		SECTION
Hill v. Buckley	203, 205, 367	Horner v. Graves	492, 493
—— v. Grey	170, 176, 181, 358, 380, 396	Horncastle v. Moat	432
—— v. Perrott	200, 446	Horsefall v. Fauntleroy	77
Hills v. Bannister	76	Horwood v. Smith	195
Hilsley v. Mears	121	Hosack v. Weaver	199
Hinely v. Margaritz	30	Hoskins v. Duperoy	236, 442
Hinckley v. Southgate	258	—— v. Stagton	113
Hinde v. Gray	492	Hotchkiss v. Oliver	186
Hinde v. Whitehouse	80, 87, 264, 267, 271, 274, 278, 280, 282, 300, 312, 392, 428, 446, 465, 467	Houdlette v. Tallman	296
Hinton v. Hudson	64	Hough v. Richardson	358, 368, 374, 382
Hipwell v. Knight	310	Houghton v. Mathews	72, 76, 95, 97
Hitchcock v. Coker	492, 493	Houlditch v. Desanges	285
—— v. Covill	420	Houlston v. Smyth	64
—— v. Giddings	149	Houriet v. Morris	19
Hoadley v. McLaine	221, 225, 229, 267, 270, 403, 441	Houston v. Dyche	276
Hodgeden v. Hubard	176, 420	Howard v. Baillie	70, 75
Hodges v. Hodges	64	Howard v. Braithwaite	79, 480
Hodgkinson v. Fletcher	66	—— v. Castle	452
Hodgson v. Loy	284, 320, 327, 336, 398, 399	—— v. Hales	371 a
—— v. Labzet	311	—— v. Hodges	206
Hoffman v. Pitt	521	—— v. Williams	526
—— v. Noble	420, 446	Howe v. Palmer	276, 278, 279, 389, 469
Hogan v. Shee	176, 416	Howell v. Elliott	526
—— v. Short	91	Howson v. Hancock	488
Hogins v. Plimpton	356, 358	Hubbard v. Cummings	26, 28, 30
Holbird v. Anderson	119	—— v. Elmer	70
Holbrook v. Baker	518, 526	—— v. Martin	144
—— v. Burt	420, 427, 456	Huddleston v. Briscoe	272
—— v. Wright	92, 100	Hudgens v. Perry	354
Holcombe v. Hewson	368	Hudson v. Granger	94, 97
Holden v. Dakin	349	Hughes v. Sloan	167
Holderness v. Shackels	108, 290, 311, 451	Huguenin v. Basley	182
Holland v. Eyre	129	Humphrey v. Lucas	88
Hollingsworth v. Napier	188, 200, 276, 289, 311, 386, 392, 393	—— v. Tucker	344
Hollis v. Claridge	283	Humphries v. Carvalho	128, 130, 250
Holman v. Johnson	159, 485, 505, 508	Hundley v. Webb	526
Holmes v. Blogg	25, 30	Hunt v. Blaquiere	62, 66
—— v. Crane	526	—— v. Boyd	219
Holst v. Pownall	332 a	—— v. Knickerbacker	217, 496, 499
Homer v. Thwing	27, 28	—— v. Livermore	251
Hook v. Gray	506	—— v. Moore	165, 182
Hooper v. Stephens	273 b	—— v. Rousmaniere	144
Hopkins v. Appleby	427, 455	—— v. Silk	427, 455
—— v. Lee	448	—— v. Ward	335
—— v. Mazyck	144	Hunter v. Beal	385, 801
—— v. Prescott	491	—— v. Princes	117
Horner v. Ashford	492	Hurlston v. Gowan	367
		Hurry v. Mangles	276, 287, 289, 339, 392
		Hurst v. Orbell	245
		Hussey v. Thornton	313, 400
		—— v. Allen	102

	SECTION		SECTION
Hussey v. Jewett	30, 31	Jennings v. Rundall	27, 28
Hutchins v. Olcott	219	—— v. Throgmorton	488
Hutchinson v. Bell	173	Jewett v. Warren	276, 287, 290, 312, 392, 398
—— v. Bowker	360	Jezeeph v. Ingram	522
—— v. Hunter	296	Johnson v. Caldwell	11
Huttman v. Boulnois	240	—— v. Dodson	266, 272, 467
Hutton v. Mansell	30	—— v. Hudson	486, 497, 498
Huxham v. Smith	305	—— v. Johnson	203, 204, 240, 243, 367, 407, 423
Hyatt v. Boyle	368	—— v. Jones	71, 77
Hyde v. Price	51	—— v. Peck	172, 420
		—— v. Pie	28
		—— v. Reed	251, 252
I.		Johnston v. Baird	391
Idle v. Royal Exch. Ins. Co.	114	—— v. Usborne	88, 93, 269, 467
—— v. Thornton	249, 252, 452	Joice v. Taylor	380
Illsley v. Stubbs	24, 327, 336, 399	Joliff v. Bendell	362
Ingledeu v. Douglas	39	Jolly v. Blanchard	100
Inglis v. Usherwood	306, 336	Jones v. Bowden	179, 361, 384, 395
Ingraham v. Wheeler	514	—— v. Bright	179, 357, 368, 371, 375, 395
—— v. Geyer	516	—— v. Caswill	484
Inhab. of Worcester v. Eaton	488	—— v. Edney	165, 420
Irving v. Motley	176, 202, 387, 446	—— v. Jones	338
—— v. Thomas	240	—— v. Littledale	76
Ive v. Chester	36	—— v. Nanney	79, 461, 470, 473, 479
Iveson v. Conington	76	—— v. Todd	23
		—— v. Waite	504
J.		—— v. Watkins	144
Jackson v. Allaway	309	—— v. Yates	518
—— v. Burchin	26	Jordan v. Norton	71
—— v. Carpenter	26, 30	—— v. Warren Ins. Co.	116
—— v. Covert	239, 260	Josephs v. Pebrer	72, 499
—— v. Galloway	125	Judd v. Langdon	526
—— v. Jacob	303, 388	Judson v. Wass	203, 204, 243, 367
—— v. Lowe	272		
—— v. Watts	278	K.	
Jacques v. Watt	136	Kain v. Old	137, 269, 270, 467
James v. Bixby	112	Kaethans v. Ferrer	120
—— v. Cotton	421	Kase v. John	421
—— v. Griffin	320, 321, 332, 333, 335, 401	Kay v. Duchess of Pienne	47
—— v. Morgan	168, 380	Keane v. Boycott	21
—— v. Shore	204, 243, 244, 407	Kearslake v. Morgan	442
—— v. Short	464	Keegan v. Smith	66
—— v. Williams	257	Kelgour v. Finlyson	70
Jarman v. Wolloton	518	Kelly v. Hurlburt	122
Jarvis v. Duke	166	—— v. Solari	144, 146
Jeffrey v. Bigelow	350, 458	Kemble v. Atkins	87, 88, 267
Jendwine v. Slade	169, 358, 360	Kemeys v. Proctor	79
Jenkins v. Hogg	468, 482, 484	Kendall v. Lawrence	21
—— v. Reynolds	257	Kinder v. Shaw	188, 201, 387
—— v. Osborne	340, 344		
Jennings v. Camp	240, 245, 245 a		
—— v. Merrill	104		

	SECTION		SECTION
Kendrick <i>v.</i> Delafield	109	Lamphir <i>v.</i> Creed	50
——— <i>v.</i> Lomax	219	Lane <i>v.</i> Borland	173
Kennedy <i>v.</i> Lee	129	Langfort <i>v.</i> Tiler	274, 300, 402, 428, 436, 456
——— <i>v.</i> Ross	526	Langton <i>v.</i> Hughes	207, 496, 505, 506
——— <i>v.</i> Whitewell	449	——— <i>v.</i> Horton	185
Kent <i>v.</i> Huskisson	276, 279, 469	La Neuville <i>v.</i> Nourse	370
——— <i>v.</i> Kent	258	Lansdowne <i>v.</i> Lansdowne	144
Kenworthy <i>v.</i> Schofield	264, 269, 270, 465, 466, 467, 468	Lansing <i>v.</i> Turner	301
Ketchum <i>v.</i> Catlin	145	Lantry <i>v.</i> Parks	245 <i>a</i>
——— <i>v.</i> Evertson	245 <i>a</i>	Lara <i>v.</i> Bird	30
Keyser <i>v.</i> Suse	311	Laussatt <i>v.</i> Lippincott	79, 101, 105, 106, 475
Kelletas <i>v.</i> Fleet	68	Law <i>v.</i> Hodgson	207, 499
Kidd <i>v.</i> Rawlinson	518	Lawley <i>v.</i> Hooper	158
Kimball <i>v.</i> Cunningham	421, 427, 431	Lawrence <i>v.</i> Beaubion	144
King <i>v.</i> Boston	422	——— <i>v.</i> Knowles	424, 426, 448, 450
——— <i>v.</i> Capper	263	Lawsatt <i>v.</i> Lippincott	95
——— <i>v.</i> Humphreys	235	Lawson <i>v.</i> Lovejoy	23, 30, 39
——— <i>v.</i> Inhabitants of Great Wigston	32	——— <i>v.</i> Weston	192, 193
——— <i>v.</i> Meredith	305, 306, 390, 398	Laythoarp <i>v.</i> Bryant	257, 266, 272, 467
——— <i>v.</i> Thom	76	Leach <i>v.</i> Mullett	462
——— <i>v.</i> Price	138, 362, 408	Leadbitter <i>v.</i> Farrow	76
King's Ex'ors <i>v.</i> Bryant's Ex'ors	15	Lean <i>v.</i> Shutz	51
Kingdom <i>v.</i> Box	210	Leave <i>v.</i> Prentice	74
Kinlock <i>v.</i> Craig	321, 327	Leavitt <i>v.</i> Blatchford	506
Kip <i>v.</i> Bank of N. Y.	96	Leckey <i>v.</i> McDermott	199
Kirkpatrick <i>v.</i> Stainer	94	Lee <i>v.</i> Huntoon	518
Kline <i>v.</i> L'Amoureux	36	——— <i>v.</i> Munn	83, 478
Klinitz <i>v.</i> Surrey	280	——— <i>v.</i> Rison	236
Knapp <i>v.</i> Lee	203, 427	Leeds <i>v.</i> Wright	305, 335, 336, 337, 390, 398, 401
Knight <i>v.</i> Crockford	266	Lees <i>v.</i> Whitcomb	257
——— <i>v.</i> Ferguson	514	Lefevre <i>v.</i> Lloyd	107
——— <i>v.</i> Hopper	428	Leger <i>v.</i> Bonaffe	145
——— <i>v.</i> Rushworth	127	Legg <i>v.</i> Lehmann	312
Kruger <i>v.</i> Wilcox	97	Leigh <i>v.</i> Patterson	412, 438
Kymer <i>v.</i> Suwercropp	320	Leonard <i>v.</i> Baker	521
		——— <i>v.</i> Vredenburg	257, 270
L.		Lent <i>v.</i> Padelford	467
Lackington <i>v.</i> Atherton	340	Leslie <i>v.</i> Bailey	143
Lacy <i>v.</i> McNeile	121	Leverick <i>v.</i> Meigs	74, 92, 94
Laidlaw <i>v.</i> Organ	165, 167, 175, 179, 380, 381, 382, 396	Levy <i>v.</i> Cohen	130
Laidler <i>v.</i> Burlinson	233, 234, 315, 316	——— <i>v.</i> Langridge	360
Laing <i>v.</i> Fidgeon	179, 368, 371	——— <i>v.</i> Levy	462
Lakue <i>v.</i> Gilkyson	14	——— <i>v.</i> Merrill	257, 270
Lamb <i>v.</i> Lathrop	307, 391	Lewis <i>v.</i> Cosgrave	420, 456
——— <i>v.</i> Loomis	391	——— <i>v.</i> Davidson	504
Lamb <i>v.</i> Craft	260 <i>a</i> , 260 <i>b</i> , 358 <i>a</i>	——— <i>v.</i> Knox	494
Lambert <i>v.</i> Knott	76	——— <i>v.</i> Lee	51
Lamen <i>v.</i> Auld	367	——— <i>v.</i> Littlefield	28
		——— <i>v.</i> Pead	11
		——— <i>v.</i> Peake	361, 454

	SECTION		SECTION
Lewis v. Whittemore	526	Maberly v. Robins	407
Lexington v. Clarke	501	Macomber v. Parker	296, 389
Lickbarrow v. Mason	173, 283, 319, 320, 399	Mactier v. Smith	126, 129, 130, 133
Liddard v. Kain	354, 356	Madeira v. Townsley	74
Lidderdale v. Montrose	494	Maddox v. Miller	35
Lightfoot v. Tennant	505	Magee v. Atkinson	88
Limerick Acad. v. Davis	127	Maiden v. Babcock	526
Lindenau v. Desborough	166, 179, 181	Mainwaring v. Leslie	64
Lines v. Rees	423, 448	Maissonaire v. Keating	503
Linscott v. McIntire	258	Makarell v. Bachelor	35
Lippincott v. Barker	516	Malin v. Malin	11, 182
Lisset v. Reave	94	Malins v. Freeman	462
Litt v. Cowley	325, 333	Maltby v. Christie	79, 470, 472
Little v. Poole	497, 498	Manby v. Scott	13, 28
Littlejohn v. Ramsey	74	Mandeville v. Welch	203, 387
Lloyd v. Brewster	176, 200, 387, 446	Manella v. Barry	75, 99, 100
—— v. Johnson	206, 488	Maney v. Killough	526
—— v. Jewett	203	Mann v. Betterly	11
Lobdell v. Hopkins	307, 391	Manton v. Moore	276, 311, 392
Locke v. Stearns	71	Marbury v. Brooks	514, 515
Lockwood v. Ewer	98	Marfield v. Douglass	98, 100
Loeschmam v. Williams	336	Margetson v. Wright	354, 362, 395
Lombe v. Scott	132	Marlow v. Pitfield	37, 55
Lomi v. Tucker	170, 171, 358, 360	Marquand v. Webb	112
Long v. Baillie	442	Marquis of Townshend v. Stan- groom	169
—— v. Preston	245, 419, 455, 456	Marsh v. Bowers	106
Loo v. Burdeaux	127	Marshall v. Campbell	274
Loomis v. Cromwell	358, 368, 376	—— v. Collett	144
—— v. Newhall	504	—— v. Lloyd	518
Loraine v. Cartwright	70	—— v. Rutton	51
Lorymer v. Smith	376, 395, 418	Marston v. Baldwin	313
Loud v. Jefferies	526	Martin v. Mayo	30
Lowber v. Le Roy	137	—— v. Mitchell	266
Lowndes v. Chisolm	144	—— v. Morgan	179, 395
—— v. Lane	166	—— v. Pennock	165
Lowne v. Collins	188	—— v. Podger	521
Lucas v. Dorrien	276, 289, 340, 392	Martindale v. Booth	518, 521
—— v. Worswick	146	—— v. Smith	225, 413, 416, 434, 449
Ludlow v. Hurd	526	Martini v. Coles	104, 105, 106
Lucena v. Crawford	102	Mason v. Briggs	307, 392
Luden v. Justice	58	—— v. Crosby	172
Lunn v. Thornton	186	Massey v. Banner	74
Lupin v. Maine	446, 510	Masson v. Bovet	417 a
Lynde v. Budd	30	Mathews v. Bliss	176, 177
Lyon v. Lamb	257, 466	—— v. L——c	488
—— v. Strong	500	—— v. Seaver	513
—— v. Tallmadge	144	Mavor v. Pyne	244, 424, 439, 451
Lyons v. Barnes	431	May v. Coffin	144
—— v. Depass	190	Mayer v. Nyas	283
		Mayfield v. Wadsley	240, 243, 504
		Maynard v. Rhode	181
		McAdam v. Walker	11
		McCarthy v. Gould	513
		M'Comb v. Wright	80, 267
M.			
Maberly v. Shepherd	278		

	SECTION		SECTION
M'Combie v. Davies	76, 104	Miller v. Showe	236, 434
McCoy v. Artcher	367	—— v. Smith	430
—— v. Huffman	25	—— v. The Mariners' Church	448
M'Cutchen v. M'Gahay	65	Milligan v. Cooke	151, 367
McCulloch v. The Eagle Ins. Co.	130, 135	—— v. Wedge	76
M'Diarmid v. M'Diarmid	10, 11, 12, 183	Millward v. Hallet	112
McDonald v. Hewett	226, 296, 303	Mills v. Ball	332, 333, 336, 401
McDonnell v. Harding	71	—— v. Camp	526
McDowall v. Wood	49	—— v. Graham	27, 28
McDowell v. Simms	482	—— v. Hunt	81, 311, 477, 243
McFerran v. Taylor	165	—— v. Warner	526
McLean v. Dunn	77, 138, 267, 274, 314, 402, 404, 409, 428, 436, 437, 457	Milner v. Tucker	426, 427, 455
McKenzie v. Hancock	139, 408, 436, 454	Milnes v. Duncan	144
McKnight v. Dunlop	240, 245	Miner v. Bradley	204, 210, 213, 407, 421, 424
McMillan v. Vanderlip	240, 245 a	—— v. Brindley	243
McNeill v. Cameron	136	Minor v. Mitchie	307
M'Gahay v. Williams	65	Misner v. Granger	368, 371
McVicker v. May	526	Missroom v. Waldo	370
Mead v. Degogeen	245 a	Mitchell v. Beal	526
Means v. Henderson	93	—— v. Kingman	10, 13
Medina v. Stoughton	357, 367, 481	—— v. Lapage	87, 117, 267
Meeker v. Wilson	160, 512, 524, 525	—— v. Reynolds	492
Megrath v. Robertson	49	—— v. Smith	207
Mellish v. Motteaux	179, 364, 374, 382, 396	M'Lees v. Hale	258
Menelone v. Athawes	235, 317	Mixer v. Coburn	349, 370
Mercer v. Jones	412	—— v. Howarth	260 a
Merchants Bank v. McIntyre	145	Mizer v. Pick	53, 66
Meredith v. Ladd	494	Mockbee v. Gardner	367
Merlins v. Adcock	449	Moffat v. McDowall	514
Merritt v. Clason	266, 467	Moggridge v. Jones	425
Merryweather v. Nixon	481	Molton v. Camroux	11, 13
Mesnard v. Aldridge	463	Moltram v. Heyer	332 a, 333, 334, 337 a, c, 341
Messier v. Amory	96	Moncrieff v. Goldborough	484
Mestayer v. Gillespie	155	Monypenny v. Hartland	371
Metcalf v. Rycroft	130	Montchori v. Montefiori	59
—— v. Shaw	56, 60	Montague v. Baron	57
Methwood v. Wallfank	494	—— v. Benedict	44, 53, 56, 57, 64
Meyer v. Everth	137, 148, 376	—— v. Espinasse	44, 53, 56, 57
Midena v. Stoughton	367, 423	Moore v. Clementson	93
Mildmay v. Hungerford	141	—— v. Fox	258
Miffin v. Smith	121, 122	—— v. Mourgue	74
Miles v. Dall	159	—— v. Payne	354
—— v. Gorton	279, 383, 285, 287, 289, 290, 303, 311, 320, 339, 340, 388, 398, 399, 469	—— v. Tracey	169
Miles v. Stevens	145	—— v. Voughton	230
Miller v. Drake	224	More v. Steven	508
—— v. Irvine	257, 270	Morehead v. Hunt	484
—— v. Livingston	72	Morgan v. Richardson	425
—— v. Race	192, 199, 387	Morley v. Altenborough	203, 367
		—— v. Boothby	257, 466
		—— v. Hay	321, 334
		Morrill v. Aden	28, 417
		—— v. Wallace	358, 360, 377

	SECTION		SECTION
Morris v. Cleesby	73, 92	Newhall v. Vargas	327, 332 a, 333, 399
—— v. McCulloch	494	Newsome v. Thornton	104, 283, 323, 399
—— v. Slacey	257, 466	Nicholas v. Hart	328
—— v. Summerl	74, 102	Nicholls v. Lawrie	323
Morris Canal Co. v. Emmett	166	—— v. La Feuvre or Slater	336
Morrison v. Gray	333, 346	Nichols v. Patten	518
—— v. Muspratt	181	Nickolle v. Plume	276
Morse v. Slue	202, 387	Nickson v. Braham	71
Mortimer v. Wright	36	—— v. Jepson	236
Mortlock v. Buller	367	Nicoll v. Mumford	514
Morton v. Lamb	388	Nightingale v. Withington	21
Mortara v. Hall	36	Nix v. Olive	337 c, 347
Moses v. Mead	373	Noble v. Adams	200, 293, 340, 387, 401
Mott v. McNeil	526	Norfolk v. Worthy	462
Motteram v. Motteram	51	Northey v. Field	325, 332 a, 333, 337 c
Maunt v. Hendricks	526	Norton v. Emmett	53
Mowatt v. Wright	144	—— v. Fazan	56, 62, 63
Mowrey v. Walsh	188, 200, 201, 387, 407	—— v. Herron	76
Mucklow v. Mangles	232, 233, 236, 315	Nott v. Hill	224
Muldon v. Whitlock	102	Nurse v. Craig	66
Mumford v. Com. Ins. Co.	116	N. Y. Fireman's Co. v. D'Wolf	303, 368, 388, 403
—— v. McPherson	137, 360, 369, 376	O.	
Munroe v. De Chemant	56	Obbard v. Belham	425
Murray v. Currie	86	Ogilvie v. Foljambe	266, 272
—— v. Judah	367	Ogle v. Atkinson	345
—— v. Lazarus	114	Okell v. Smith	358, 368, 418, 422, 427, 439, 456
—— v. Riggs	514	Okill v. Whittaker	157
Mussell v. Cooke	263	Oldfield v. Lowe	234, 316
Mussen v. Price	236, 431, 434, 444	—— v. Round	382, 482
Myers v. State	500	Olive v. Smith	97
N.		Oliver v. Houdlet	21
Nantes v. Coinock	513	Ollivant v. Bayley	372, 395
Nathrop v. Graves	145	Olyphant v. Baker	298 a, 300
Naylor v. Winch	144	O'Mealey v. Wilson	19
Neal v. Williams	446	Oneida Manuf. Co. v. Lawrence	357, 368
Neate v. Ball	324	Onslow v. Eames	362
Neil v. Cheves	274, 428	Oppenheim v. Russell	321, 401
Nelson v. Albridge	477	Osborne v. Fuller	526
—— v. Sanborne	257, 270	Osey v. Gardner	345
Nerot v. Wallace	251	Osgood v. Franklin	224
Neville v. Wilkinson	167	—— v. Lewis	368, 373
New v. Twain	277, 283, 285, 298	Osmond v. Fitzroy	11, 182
Newbold v. Wright	106	Outwater v. Dodge	292
Newbiggin v. Pillans	49	Owen v. Gooch	71
Newbury v. Armstrong	257	Owenson v. Morse	219, 334, 442
Newcastle, N. C. v. Red River R. R. Co.	94	Oxendale v. Wetherell	424, 439, 451
Newell v. Fisher	15	Ozard v. Darnford	62
New England Ins. Co. v. The Brig Sarah Ann	112, 114, 115		

P.	SECTION		SECTION
		Pennell v. Woodburn	454
		Penniman v. Hartshorne	266, 467
Packard v. Richardson	257, 270	Penny v. Martin	116
Packford v. Maxwell	219	— v. Porter	453
Page v. Pavay	454	Penrose v. Currex	28
Pagot v. Porchard	520	People v. Moores	32
Paige v. Ott	244, 245 a	Percival v. Blake	427, 455
Palmer v. Bate	491	Perkins v. Binke	27
— v. Lorillard	116	— v. Hart	213
— v. Scott	266	— v. Lyman	492
Palmerton v. Huxford	77	Perley v. Balch	420, 425, 427, 455
Paradine v. Jane	240	Perrott v. Perrott	144
Parish v. Stone	243, 425	Peru v. Turner	126
Park v. Hammond	74	Perry v. Aaron	364
Parker v. Brancker	98, 100	Peter v. Beverly	219
— v. Donaldson	94	— v. Compton	258
— v. Palmer	376, 427, 455	Peters v. Ballistier	344
— v. Pringle	454	— v. Fleming	34
— v. Rawlings	303, 388	Peto v. Blades	367, 369
Parkhurst v. Cortlandt	269	Petrie v. Hannay	506
Parkin v. Dick	505	Phalen v. Clark	506
Parkinson v. Lee	353, 358, 370, 376, 395	Pickard v. Cottels	504
Parrot v. Eyre	76	Pickering v. Appleby	263
Parsons v. Hughes	159, 485	— v. Busk	72, 89, 202, 387, 446, 450
Partridge v. Clarke	58	— v. Dowson	137, 169, 360, 376
— v. Gopp	512	Pickerton v. Litecote	367
Parvis v. Rayer	203, 367, 423	Pickstock v. Lyster	501
Pasley v. Freeman	165, 352, 367, 395, 423	Pidcock v. Bishop	165, 174, 179, 381, 396
— v. Trueman	173	Pierce v. Drake	443
Patapsco Ins. Co. v. Southgate	114	— v. Fuller	492
Patmore v. Coleman	245	— v. Jackson	169
Paton v. Rogers	155, 203, 205, 310, 367, 387, 407, 423	Pierpont v. Lord	516
Patterson v. Gandasequi	76, 93	Pilling v. Armitage	181, 381, 383, 396
— v. Robinson	449	Pinkham v. Gear	144
— v. Tash	104	Pitt v. Smith	15
Patteshall v. Tranter	405, 427, 448, 455	— v. Thompson	58
Patton v. Nicholson	503	Pitts v. Waugh	122
— v. Smith	526	Phelps v. Decker	488
Payne v. Cave	125, 461	Phettilplace v. Sayles	525
— v. Rodden	367	Phillimore v. Barry	266, 467
— v. Shadbolt	290, 311	Phillips v. Bistolli	276, 278, 469
— v. Whale	245, 410, 421, 422, 431, 451	— v. Duke of Bucks	166
Peale v. Northcote	92	Philpotts v. Evans	438
Pearson v. Meadow	58	Phippen v. Stickney	484
— v. Morgan	165, 380	Planche v. Colburn	213
Peer v. Humphrey	188, 190, 191, 195	Platt v. Oliver	481
Peigne v. Sutcliffe	27	Pleasants v. Pendleton	311
Pellecat v. Angell	506, 508, 509	Plumpton v. Cook	68
Peltier v. Collins	257	Polhill v. Walter	167
Pemberton v. Vaughan	492	Poole v. Shergold	151, 152, 243
		Pope v. Lewins	356
		— v. Nicherson	114, 116, 117

	SECTION		SECTION
Poplett v. Stockdale	206	Reed v. Batchelder	22, 39
Porter v. Blood	100	— v. Blandford	427
Pothonier v. Dawson	98	— v. Darby	114
Pott v. Turner	85	— v. Jewett	526
Potter v. Sanders	129, 130	— v. Moore	64
Poulton v. Latimore	138, 405, 408, 244, 409, 427, 439, 455, 456	— v. Rann	72, 86, 470
Powell v. Edmunds	79, 403, 480	— v. Upton	128, 219, 250, 276, 400
— v. Horton	353	— v. Wilmott	518, 520, 521
— v. Trustees of Newburgh	72, 470	Reeves v. Capper	292, 400
— v. Wells	421	— v. Harris	313
Power v. Barham	170, 171, 358, 360	Reinicker v. Smith	15
— v. Wells	236, 410, 421, 422, 431	Retchie v. Summers	367
Prentiss v. Russ	165, 447	Rex v. Arundel	484
Price v. Lea	243	— v. Marsh	484
— v. Nixon	434	— v. The Inhabitants of Whit- marsh	500
Prince v. Clark	480	— v. Waddington	490
Probart v. Knouth	23, 24, 37	Reynolds v. Waller's Heir	15
Proctor v. Jones	278, 279, 290	Rice v. Austin	287, 392, 398
Propert v. Parker	266, 467	Rich v. Coe	113
Prosser v. Hooper	405, 455	Richards v. Sears	229
Pultney v. Keymer	104, 106	Richardson v. Anderson	89
Purvis v. Rayer	367	— v. Brown	358
		— v. Goss	337
		— v. Mellish	490, 494
Q.		Richmond Trading Co. v. Farquar	71, 358
Quarles v. George	412	Ricks v. Dillahurtz	360
Queiroz v. Freeman	106	Rider v. Kidder	513
— v. Trueman	104, 106	Riddle v. Varnum	286, 296
		Robbins v. Otis	30
R.		Roberts v. Jackson	72, 470
Rabone v. Williams	93	— v. Morgan	357
Rainsford v. Fenwick	33, 34	— v. Roberts	159
Rainwater v. Durham	34	— v. Tucker	257
Randall v. Cook	526	Robertson v. Clark	114
— v. Phillips	513	— v. Ewell	527
Randleson v. Murray	76	Robinson v. Anderlin	367, 423
Randolph v. Ware	102	— v. Batchelder	307
Ranson v. Roberdean	477	— v. Commonwealth Ins. Co.	114
Rathbun v. Rathbun	276	— v. Dauchy	200, 201
Rawlins v. Vandyke	57	— v. McDonnell	159, 185, 186, 518
Rawlinson v. Pearson	85	— v. Musgrove	462
Rawson v. Johnson	388, 391, 453	— v. Nahon	56
Raymond v. Bearnard	245	— v. New York Ins. Co.	72, 470
— v. Comm	76	— v. Reynolds	48
Reab v. Moore	240	— v. Schly	224
Read v. Bonham	114	— v. Wall	482
— v. Hutchinson	176, 434	— v. Wilkinson	122
— v. Livingston	513	Roby v. West	499, 504
— v. McAllister	203	Roche v. O'Brien	490
— v. Moor	245 a	Rodriguez v. Heffernan	103
Reader v. Knatchball	303, 388, 452		
Reed v. Barber	367		

	SECTION		SECTION
Roe v. Hersey	20	Sanders v. Powell	481
Roffey v. Shallcross	204, 243, 367, 387, 407, 423	Sandilands v. Marsh	119, 272
Rogers v. Batcheldor	121	Sandiman v. Breach	501
—— v. Kneeland	70, 257, 470	Sands v. Taylor	314, 402, 404, 427, 436, 455
—— v. Walker	10	Sargent v. Franklin	449
Rohde v. Thwaites	233, 279, 287, 305, 320, 369, 398, 469	Saunders v. Wakefield	257, 270
Roland v. Gundy	199	Saunderson v. Jackson	266, 272, 469
Rolfe v. Abbott	36	Savage v. Birkhead	72
Roll v. Wilson	412	—— v. Foster	28
Rondeau v. Wyatt	239, 260	Savary v. Goe	307, 391
Roof v. Stafford	25, 26	Savill v. Robertson	122
Roosevelt v. Fulton	165	Sawyer v. Joslin	335
Root v. French	173, 188, 200, 387	Schenks v. Strong	28
Roots v. Lord Dormer	204, 241, 243, 464	Schermerhorn v. Loines	102
Roper v. Coombes	321	Schiefflin v. N. Y. Ins. Co.	116
Rose v. Beattie	368	Schimmelpennick v. Bayard	71, 350
—— v. Cunningham	272	Schneider v. Heath	179, 374, 382
—— v. Daniel	21	—— v. Norris	266, 487
—— v. Maynard	490	Scholefield v. Eichelberger	503
Rosher v. Busher	113	—— v. Robb	362
Rossiter v. Rossiter	70	Schutt v. Large	200
Rosure v. Vaughan	373	Schuyler v. Russ	354
Routledge v. Grant	126, 136, 461	Scott v. Crane	307
Rowe v. Osborne	267, 405	—— v. Eastern Counties Rail- way	261
—— v. Pickford	335, 336, 401	—— v. Gilmore	501
Rowell v. Montville	125	—— v. Hanson	169
Rowley v. Bigelow	176, 320, 335, 446, 510	—— v. Irving	89, 230
Rucker v. Cammeyer	87, 267	—— v. Lara	173
Russell v. Bangley	89	—— v. Pettit	335, 337, 401
—— Clark	169	—— v. Scott	367
—— v. Hankey	74	—— v. Surman	70, 95, 96
—— v. Minor	276	—— v. Wells	296
—— v. Nicoll	266, 296	Serace v. Whittington	76
—— v. Slade	258	Scully v. Biddle	114
Rutter v. Blake	422, 427	Seaman v. Waddington	503
Ryall v. Rolle	392	Searle v. Keeves	276, 311, 312, 392
		—— v. Scovell	116, 117
		Sears v. Brink	257, 270
		Seaton v. Benedict	53
		Seaver v. Phelps	10, 12, 13, 14
		Seaving v. Brinkerhoff	514, 516
		Seicas v. Wood	358
		Selby v. Selby	266
		Sellers v. Dugan	499
		Selway v. Fogg	159, 446
		Sentance v. Poole	10, 13
		Seton v. Slade	81, 266
		Sewall v. Fitch	239, 260, 260 a, 268, 468
		Seward v. Coesvelt	359
		Sewhanberg v. Buchanan	358
		Sexton v. Wheaton	513
		Seymoar v. Davis	241, 243, 260 a, 261, 262
S.			
Sadock v. Barton	74		
Sage v. Wilcox	257, 270		
Sagre v. Peck	137		
Salem India Rubber Co. v. Adams	432		
Salisbury v. Stainer	368, 376		
Salmon v. Bennett	513		
Salomons v. Nissen	345		
Salte v. Field	324, 332		
Saltus v. Ocean Ins. Co.	116, 117		
Samms v. Alexander	199		
Sanborn v. Kittredge	312 a		
Sanders v. Jameson	418		

	SECTION		SECTION
Seymour <i>v.</i> Delancy	15	Smith <i>v.</i> Bacock	169, 170, 171
——— <i>v.</i> Bennet	251	——— <i>v.</i> Bowles	323, 327
Shackell <i>v.</i> Rosier	504	——— <i>v.</i> Bromley	488, 514
Shannon <i>v.</i> Shannon	24	——— <i>v.</i> Burnham	122
Shaw <i>v.</i> Badger	424	——— <i>v.</i> Cadogan	102
——— <i>v.</i> Boyd	23	——— <i>v.</i> Clarke	169, 181, 482
——— <i>v.</i> Nudd	412	——— <i>v.</i> Cologan	74, 77, 473
——— <i>v.</i> Robins	376	——— <i>v.</i> Field	324, 332, 419, 455, 456
——— <i>v.</i> Turnpike Co.	251	——— <i>v.</i> Foster	251
Sheery <i>v.</i> Mandeville	219	——— <i>v.</i> Goss	335
Sheldon <i>v.</i> Cox	445	——— <i>v.</i> Greenlee	484
Shelton <i>v.</i> Livius	79, 463	——— <i>v.</i> Gugerty	610
Shendler <i>v.</i> Houston	276 <i>a</i>	——— <i>v.</i> Henry	526
Shepley <i>v.</i> Davis	296, 340, 389	——— <i>v.</i> Lascelles	74, 76, 102, 305, 390
Shepherd <i>v.</i> Hampton	412, 448, 449	——— <i>v.</i> Low	30
——— <i>v.</i> Kain	148, 166, 353, 354, 358, 374, 377, 396	——— <i>v.</i> Loomis	307
——— <i>v.</i> Pylus	371	——— <i>v.</i> Mayo	30
——— <i>v.</i> Temple	425, 427	——— <i>v.</i> Neil	526
Sherwood <i>v.</i> Robins	165, 462	——— <i>v.</i> Richards	165
Shields <i>v.</i> Pettee	249, 448 <i>a</i>	——— <i>v.</i> Sparrow	502
Shipley <i>v.</i> Kymmer	104, 106, 193	——— <i>v.</i> Surman	239, 260, 276, 278, 467, 469
Shipton <i>v.</i> Thornton	116	——— <i>v.</i> The Bank of Scotland	165, 296
——— <i>v.</i> Casson	439, 451	——— <i>v.</i> Westall	255
Shipman <i>v.</i> Saunders	453	——— <i>v.</i> Wilson	219
Shillitoe <i>v.</i> Claridge	362	Smout <i>v.</i> Ilbury	76
Short <i>v.</i> Skipwith	100	Smull <i>v.</i> Jones	484
Shotwell <i>v.</i> Murray	144	Snee <i>v.</i> Prescott	318, 320
Shove <i>v.</i> Well	367	Snow <i>v.</i> Peacock	192
Shrewsbury <i>v.</i> Blount	173	——— <i>v.</i> Sadler	192, 193
Shurtleff <i>v.</i> Willard	518	Snyder <i>v.</i> Gee	526
Shumway <i>v.</i> Butter	526	Solly <i>v.</i> Rathbone	79, 103, 104, 106, 475
Shute <i>v.</i> Door	258	Solomons <i>v.</i> Bank of England	192
Sias <i>v.</i> Bates	456	Solomon <i>v.</i> Turner	421, 425
Sickels <i>v.</i> Patteson	245 <i>a</i>	Somes <i>v.</i> Ingrue	114
Siffkin <i>v.</i> Boyd	252	——— <i>v.</i> Brewer	446
——— <i>v.</i> Wray	323	Souter <i>v.</i> Drake	203, 367, 423
Sims <i>v.</i> Brittain	108	South Car. Bank <i>v.</i> Case	119
Simmons <i>v.</i> Swift	233, 299, 300, 315, 340, 389	Southard <i>v.</i> Steele	120
Simon <i>v.</i> Metivier	264	Soward <i>v.</i> Palmer	219
Simpson <i>v.</i> Blois	506	Spear <i>v.</i> Travers	341, 392
——— <i>v.</i> Robertson	36	Spencer <i>v.</i> Cone	260
——— <i>v.</i> Swann	74, 107	Spittle <i>v.</i> Lavender	474
Skinner <i>v.</i> Dayton	120	Spooner <i>v.</i> Brewster	46
Slark <i>v.</i> Highgate Archway Co.	79, 463	Spratt <i>v.</i> Jeffrey	367
Slubey <i>v.</i> Hayward	342, 401	Spreadbury <i>v.</i> Chapman	53
Smaith <i>v.</i> Burridge	121	Springfield <i>v.</i> Allen	367
Small <i>v.</i> Atwood	360	Springfield Bank <i>v.</i> Merrick	207, 496, 499
——— <i>v.</i> Marwood	514, 516	Springwell <i>v.</i> Allen	364
Smalle <i>v.</i> Marrable	371	Spurrier <i>v.</i> Elderton	478
Smart <i>v.</i> Sanders	98	Spurrit <i>v.</i> Spiller	514
Smedley <i>v.</i> Gooden	200, 446		
Smith <i>v.</i> Acker	526		
——— <i>v.</i> Atkins	185, 526 <i>a</i>		

	SECTION		SECTION
Taylor v. Reed	448, 449	Touissant v. Martinnant	229
— v. Ross	270	Toulmin v. Hedley	418, 422 a
— v. Sands	371	Towers v. Barrett	446, 456 a
— v. Taylor	182	— v. Osborne	260 a, 260 b
— v. Trueman	199	Towell v. Gate	352 a
— v. Weld	159, 485	Towler v. McTaggart	336
Tempest v. Fitzgerald	276, 278, 312	Towne v. Collins	199, 201, 387
Tennant v. Elliot	208, 506, 507	Townley v. Crump	279, 287, 289, 312, 339, 340, 398, 469
Terry v. Belcher	526	Townsend v. Westcott	513
Thatcher v. Dinsmore	76, 219	Townshend v. Stangroom	484
Thaxton v. Edwards	391	Train v. Gold	126, 127
Thayer v. Turner	420, 447	Transley v. Turner	311
The King v. Watson	514	Travers v. —	127
The State v. Gaillard	370	Treadwell v. Union Ins. Co.	116
Thilpresse v. Brownlow	121	Trencher v. Warley	160
Thomas v. Bishop	76	Trenttel v. Brandon	106
— v. Dering	205, 310, 367, 424	Trott v. Warren	188, 200, 387
— v. Heathorn	442	Trotter v. Howard	526
Thompson v. Alger	276 n	Trower v. Newcombe	169, 380, 381
— v. Davenport	76, 122	Trueman v. Hurst	39
— v. Davis	484	Trull v. Eastman	185
— v. Hervey	64	Tucker v. Buffington	276
— v. Lay	30	— v. Gordon	367
— v. Leach	13, 14, 514	— v. Humphrey	344
— v. Maceroni	276	— v. Moreland	32, 30
— v. Means	492	— v. Ruston	340
— v. Perkins	92	— v. Wilson	97, 98
— v. Thompson	494, 507	— v. Woods	125
Thorn v. Hicks	113	Tufts v. Ridder	252
Thornborow v. Whitacre	380	Tuberville v. Whitehouse	38
Thornett v. Haines	482	Turner v. Harvey	157, 169, 174, 175, 176, 381, 382
Thornton v. Davenport	526	— v. Turner	144
— v. Kempster	87, 267	Tuttle v. Love	136
— v. Wynn	405, 417, 419, 421, 426, 431, 455, 456 a	Tuxworth v. Moore	276
Thorpe v. Thorpe	251	Twining v. Morrice	484
Thowld v. Smith	71, 77	— v. Morrill	169
Thrall v. Newell	357 a	Tye v. Fynmore	254
Thurston v. Blanchard	420, 427, 455, 456	— v. Gwynne	425
Tibbetts v. Towle	276	Tyson v. Thomas	499
Tiffit v. Barton	518, 526		
Timrod v. Shoolhed	370		
Tisdale v. Harris	263		
Titcomb v. Seaver	96		
Tobey v. Chafflin	76		
Toby v. Reed	526		
Tod v. Gee	155		
Todd v. Raid	89		
— v. Stokes	64		
Tomkins v. Bernet	488		
Tooke v. Hollingsworth	96, 398		
— v. Barrett	405, 410, 417, 421, 422, 426, 427, 431, 455, 456		
Towers v. Osborne	232, 239, 260		

U.

V.		SECTION	SECTION	
Vale v. Bayle	305, 306, 390, 398		Wallace v. Breeds	297, 300, 340, 389
Valkenburgh v. Watson	36		——— v. Morse	28
Valpy v. Gibson	353		——— v. Telfair	74, 102
Van Allen v. Vanderpool	95		Waller v. Cralle	224, 526
Van Anringe v. Peabody	101		Walley v. Montgomery	329, 336, 344
Van Blunt v. Pike	311		Walter v. Ross	73, 341
Van Ostrand v. Reed	219		Ward v. Byrne	492, 493
Vandervoort v. Col. Ins. Co.	137, 376		——— v. Center	169
Vandyck v. Hewitt	488		——— v. Evans	77
Varner v. Nobleborough	219		——— v. Shaw	296
Varnum v. Camp	514		——— v. Sumner	518, 526
Vasse v. Smith	27, 28		——— v. Wood	498
Vearnie v. Williams	482, 495, 573		Warder v. Tucker	141
Vere v. Ashley	119		Waring v. Cox	344
Vernon v. Keys	167, 169, 172, 360, 396		——— v. Favence	93
Verplanck v. Sterry	513		——— v. Haggart	165, 420
Vertue v. Jewell	323, 327, 344, 345		——— v. Mason	76, 368, 439, 455
Vibbard v. Johnson	203, 367		Warner v. M'Kay	94
Vick v. Keys	526		Warren v. Leland	303 a
Vickery v. Welch	492		——— v. Manufacturing Ins. Co.	498
Vigers v. Pike	159, 485		Waterhouse v. Skinner	388, 391, 453
Vincent v. Germon	276, 276 a, 277		Waters v. Brogden	71
Violet v. Patton	127, 257, 270		——— v. Travis	155
Von Bracklin v. Fonden	373		——— v. Smith	58
Von Bramer v. Cooper	21		Watkins v. Birch	521
Voorhees v. Earl	417 a, 421		Watson v. Denton	362
——— v. De Meyer	152, 310		——— v. Threlkeld	56
			Watts v. Creswell	28
			——— v. Friend	239, 260, 260 a, 499
W.			Waymell v. Reed	506, 508
Waddington v. Oliver	214, 311, 424, 431, 448, 451		Webb v. Welch	28
Wailing v. Toll	36, 37		Webber v. Twill	221
Wain v. Warlters	257, 270		Webster v. Seekamp	112, 113
Wainwright v. Crawford	102		Weeks v. Leighton	25
Waite v. Jones	504		——— v. Wood	526
Wait v. Maxwell	13		Weightman v. Caldwell	266, 467
Waithman v. Wakefield	44, 56, 57		Wells v. Horton	258
Walden v. Payne	68		——— v. Williams	19
Waldo v. Martin	72, 470, 491		Welch v. Hayden	526
Walford v. Dutchess of Pienne	50		——— v. Center	349
Walker v. Constable	264, 269, 465		Wentworth v. Outhwaite	320, 321, 332, 334, 335
——— v. Dixon	244, 311, 424, 448, 451		West v. Cutting	421, 456
——— v. Birch	97, 292		——— v. Wentworth	449
——— v. Falconer	508		West Boylston Manufacturing Co. v. Searle	95, 219
——— v. Moore	458		Westburg v. Aberdeen	166
——— v. Nussey	273 b		Western v. Russell	266
——— v. Pakins	488		Weston v. Downes	236, 410, 417, 421, 422, 424, 431
——— v. Smith	95		Wetherby v. Barnham	433
——— v. Symonds	179		Wetherell v. Jones	497
Wallace v. Agry	219			

	SECTION		SECTION
Wethers v. Reynolds	451	Williamson v. Allison	361, 432
Weymouth v. Boyer	97	v. Watts	206, 488
Wheadon v. Olds	145, 151	Willing v. Peters	367
Wheaton v. Wheaton	144	Willings v. Consequa	349
Wheeler v. Braid	245	Willink v. Vandervear	165
v. Collier	257, 482	Willis v. Twambly	24, 26
v. Russell	207, 496, 499	Wilmot v. Hurd	360
v. Train	526	Wilmshurst v. Baker	449
Wheelwright v. Depeyster	188, 199, 200, 201, 387	v. Bowker	344
White v. Chapman	86, 92	Wilson v. Force	443
v. Cole	526	v. Hooper	526
v. Lady Lincoln	74	v. Kease	25
v. Proctor	80, 287, 465	v. Marsh	360
v. Wilks	296, 340, 389, 449	v. Marryat	18
Whitehead v. Anderson	325, 332 b, 334, 335, 337, 338	v. Milton	116
v. Tuckett	71, 89	v. Royal Exchange Assur. Co.	116
Whitehouse v. Frost	287, 389	v. Smyth	66
Whitmore v. Woodward	512	v. St. Clair	144
Whitney v. Allaire	447, 458 a	Winch v. Winchester	166
Whitney v. Dutch	22, 23, 30, 39	Winks v. Hassall	279, 289, 290, 340, 469
v. Lewis	203	Winn v. Columbian Ins. Co.	114
v. Sutton	357	Winship v. Bank of U. S.	121, 122
Whitwell v. Wyer	272	Winsor v. Lombard	210, 353, 358, 373
v. Vincent	313	Winshurst v. Deeley	310
Whittingham v. Hill	38	Winston v. Gwathney	
Whittier v. Smith	169	Wilt v. Franklin	514
Widgery v. Haskell	514, 516	Wiltshire v. Sims	95
Wightman v. Coates	30	Wiseman v. Vandeput	318
Wilbur v. Howe	484	Withers v. Lyp	340
Wildman v. Wildman	263	v. Reynolds	244, 451
Wiley v. Lashlee	526	v. Smith	68
Wilkes v. Ellis	79	Withington v. Herring	70
v. Ferris	276, 280, 311, 392	Wolfe v. Horncastle	102
Wilkins v. Evans	493	v. Leyster	484
v. Martin	86	v. Luyster	482
v. Wetherell	58	Wood v. Benson	240, 243, 504
Wilkinson v. Johnston	146	v. Griffith	155
v. King	190	v. Jones	327
v. Leland	77	v. Roach	399
Williams v. Allison	364, 432	v. Smith	257, 352, 395
v. Barton	104, 202	v. Tassell	301
v. Brown	68	v. Witherich	39
v. Hurt	421	v. Wood	230
v. Inabret	15	Woodbury v. Minot	151
v. Littlefield	100	Woodham v. Baldock	521
v. Merle	188, 201, 387	Woodin v. Burford	71, 350
v. Millington	79, 80, 82, 267, 471	Woodley v. Brown	449
v. Moor	22, 39	Woods v. Hall	484
v. Nichols	109	v. McGee	296
v. Paul	502	v. Russell	233, 234, 315, 316, 449
v. Spafford	148, 376, 377, 395	Woodward v. Thatcher	451, 427
v. Watts	39	Word v. Vance	28

	SECTION		SECTION
Wordell <i>v.</i> Smith	520, 531	Yates <i>v.</i> Boen	Y.
Worsley <i>v.</i> Demattors	519	Yeates <i>v.</i> Pim	15
——— <i>v.</i> Wood	251	——— <i>v.</i> Pym	229
Wren <i>v.</i> Kinton	74	Young <i>v.</i> Cole	358, 368
Wright <i>c.</i> Campbell	345	——— <i>v.</i> McClure	74
——— <i>v.</i> Crookes	137	Youqua <i>v.</i> Nixon	520
——— <i>c.</i> Darrah	80, 89, 267, 468, 176		240
——— <i>c.</i> Hart	368, 395		Z.
——— <i>v.</i> Lawes	332, 335, 336, 401	Zagury <i>v.</i> Furnell	296, 389
——— <i>v.</i> Wilson	165, 420	Zinn <i>v.</i> Rowley	300
Wrightup <i>v.</i> Chamberlain	154	Zouch <i>v.</i> Parsons	22, 29
Wayburd <i>v.</i> Stanton	72	——— <i>v.</i> Woolston	75
		Zwinger <i>v.</i> Samuda	341, 392

SALE OF PERSONAL PROPERTY.

CHAPTER I.

OF THE NATURE OF A CONTRACT OF SALE.

§ 1. A SALE is a transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration. If the property in any commodity be voluntarily transferred without a valuable consideration, it is a gift; if one article be exchanged for another, it is a barter; but a sale takes place only, when there is a transfer of the title to property, for a price.¹

§ 2. By the Roman law, the contract of sale did not operate to transfer the property immediately, but was only a mutual agreement for the transference thereof, without regard to the time of performance. It therefore embraced, within its terms, not only an absolute sale, but also what is called, in the law of England and America, an executory contract of sale.

¹ 2 Black. Comm. 323, 446; Com. Dig. (Biens) D. 3. This is also the rule adopted by the Civil Code in France. "La vente est une convention, par laquelle l'on s'oblige a livrer une chose et l'autre a la payer. Elle est parfaite entre les parties des qu'on est convenue de la chose, et du prix, quoique la chose n'est pas encore été livrée ni le prix payé. Code Civile 1582, 1583.

It did not necessarily convey a *jus in re*, as by our law, but merely a *jus ad rem*.¹ The same definition of a sale was adopted in France previous to the Code Napoleon. It is a contract, says Pothier, by which the seller engages to the other, that he shall give him, with an unquestionable title of property, the thing bargained for, for a certain price in money, which the buyer engages reciprocally to pay. The contract is executed on the part of the seller by tradition or delivery of the thing sold, and the effect of the tradition is to pass to the person of the buyer the property to the thing sold, provided he has paid the price, or credit has been given for it.²

§ 3. The same doctrine also formerly obtained in Holland, — sale being considered as a contract completed by consent, the property remaining in the seller until tradition thereof to the buyer, and the buyer, in the mean time, having only a personal action.³

§ 4. In Scotland, also, the rule was the same. It is laid down by Erskine, that “though the contract is entered into and perfected, with a view of transferring the property to the buyer, it is not actually transferred, but remains with the seller or vendor, till the delivery of the subject.”⁴ In other words, a sale is only a contract to transfer, and not, in itself, a transference. It is the *titulus transferendi domini*, but the *modus*, by which the transfer is accomplished, is tradition, before which no property passes.⁵

§ 5. In France, under the Code Civile, and in Holland,

¹ Bell on Sale, p. 9.

² Pothier, Trait. Contrat de Vente, No. 312, 318.

³ Van der Linden, B. 1, c. 15, § 9.

⁴ Ersk. Pr. 32.

⁵ 1 Bell, Comm. 435; Bell, Law of Scot. (3d edit.) 28; 3 Ersk. Pr. 3, § 2-4; 1 Stair, 11.

under the Code de Commerce, the doctrine of the English and American law now obtains, and the property is immediately transferred by the sale. In Scotland, however, the old doctrine of the Roman law still keeps its ground.

§ 6. The practical effect of this difference between the Roman, and Scottish, and the English law, is twofold. In the first place, in case of the bankruptcy of the seller before the delivery of the subject-matter of sale, by the English law, his creditors have only a lien thereupon for the unpaid price, and upon payment thereof, the buyer may claim and take the goods; but by the Scottish law, the creditors may consider the property as still belonging to their debtor, leaving the buyer to come in with the other creditors to reclaim his price, if it have been paid, or to claim damage for non-delivery. In the second place, the buyer may, by the Scottish law, upon receiving the article, always reject it, if it do not correspond to the agreement;—while by the English law, this right depends upon circumstances. It is also evident, that the fact, that the property is in the seller, will lead to many other differences in the remedies of the parties, which will appear in the course of this treatise.¹

§ 7. There is also another difference between the Roman and Scottish law, and the law of England and America, which deserves attention. By the Roman law, the contract of sale did not transfer the absolute right of property, but merely the interest of the seller, whatever it might be. The seller was understood to affirm “*ut rem emptori habere liceat non etiam ut ejus habeat*.” If, therefore, he sold property which was not his own, *bonâ fide*, the buyer had no remedy against him. If he sold *malâ fide*, the buyer had his action of damages only.²

¹ See Post; Bell on Sale, p. 13, 14.

² *Africain de actionibus empt. et vendit.* Loi. 30, § 1. Duranton, Du Contrat de Vente, Tom. 16, Liv. 3, tit. 6, § 18, § 176.

So, also, by the old law of France, a sale did not carry with it a guaranty of title in the subject-matter, as it does by the law of England and America, and by the modern French law, as enunciated in the Code Napoleon.¹

§ 8. The contract of sale in England and America is, according to the terminology of the Roman law, *consensual*, or requiring consent; *synallagmatic*, or containing reciprocal engagements; and *commutative*, or requiring the interchange of supposed equivalents.² It can be effected only where there are competent parties, a mutual assent to certain terms, a defi-

¹ There seems to have been a difference of opinion among the jurists of France, as to whether the old French law followed the Roman Law, by which the property in the thing sold was not transferred. Pothier thought, that the Civil Law followed the Roman Law, and understood the words, "*ut emptori rem pro certe pretio habere liceat*," to import nothing more than an obligation to deliver the article sold to the buyer, and to defend his possession of it, but not to require him to transfer the property thereof, — guaranteeing an absolute right thereto against the whole world. Pothier, *Contrat de Vente*, n. 1. So, also, Caillet thought, that the seller only parted with his rights, but did not warrant the property to be his. *Thesaurus de M. Meerman*, Tom. 2, ad. c. 5, d. tit. So, also, Ducarroy was of the same opinion. *Institutes Expliquées*, Liv. 3, tit. 23, n. 2038. Toullier, also, agreed to this doctrine. *Le Droit Civil Français*, Tom. 14, n. 240. But Denizart (tome 9, v^o Garantie,) and Argon (*Inst. au Droit Français*, liv. 3, ch. 23,) are of a different opinion, and think, that by the French law the property in the thing sold was transferred. So, also, Duvergier (*Droit Civil Français*, Vol. 1, De la Vente, ch. 1, Sect. 1, § 12, 16) maintains the same doctrine. By the 1599th Art. of the Code Napoleon, this whole question is, however, set at rest, since it enacts, that "*la vente de la chose d'autrui est nulle*."

² Pothier, *Contrat de Vente*, P. 1, § 1. *Emptio venditio est contractus juris gentium nominatus, bonæ fidei, synallagmaticus, solo consensu constans, quo id agitur ut emptori rem pro certe pretio habere liceat*. Vinnius, *Comm. ad Inst. Lib. 3, tit. 21–29*. The Roman Law is precisely equivalent to the English Law in all these respects, except, that it requires the contract to be *nominatus* or express, whereas by the Common Law it may be implied. See also Pothier, *Contrat de la Vente*, n. 1; Duvergier, *Droit Civil Français*, Vol. 1, De la Vente, ch. 1, Sect. 1, § 9.

nite subject to be sold, and a certain price. In the consideration of the elements of this contract, therefore, the following division naturally suggests itself as convenient ; 1st. Parties competent to contract ; 2d. Mutual assent ; 3d. The subject of sale ; 4th. The price ; and these subjects we shall consider consecutively.

CHAPTER II.

OF THE PARTIES TO A CONTRACT OF SALE.

§ 9. IN respect to the ability or disability of certain classes of persons to make a contract of sale, the same principles govern, as are applicable to contracts in general. All persons who are competent to contract, may become parties to the contract of sale. There are, however, certain classes, whose power to contract is restricted within certain limits, and other classes, who are wholly disabled from contracting. The former class consists of those, who are by nature, or calamity, or self-debasement, rendered actually incompetent properly to guard their own interests; such as idiots, lunatics, and drunkards. The latter class consists of those, whom the law has disabled from contracting from regard to the inexperience and passion of youth, or the requirements of harmonious domestic life; or the exigencies of society; or the demands of brutal custom and unrighteous power; namely 1st. Outlaws and persons attainted; 2d. Aliens; 3d. Infants; 4th. Married women; 5th. Seamen; 6th. Slaves. These different classes we shall briefly consider in the order in which they are named.

§ 10. The first class which we shall consider, is that in which there exists a natural incapacity. An ability to understand and assent with intelligence to the terms of a contract, are necessary prerequisites to the power to make a contract; and, the first incompetency recognized by the law, arises when infirmity dims or destroys the mental power. Therefore it is

that neither lunatics nor idiots are competent to contract.¹ A lunatic is a person whose faculties are deranged, and whose mind is unsound, crazy, and incapable of sequence of thought or argument. If his lunacy be continuous and unbroken, he is wholly incapable of making any contract, either for himself or in behalf of another ;² but if it be merely intermittent and occasional, leaving the mind in full and sane exercise of its powers during certain intervals, the party may make a binding contract during such intervals.³ So, also, if the insanity be permanent, or incurable, and a lucid interval occur, a contract then made will be valid, although insanity immediately precede and follow. Again, if the lunacy be merely upon a particular point, and in respect to some one subject or class of subjects, and the party be perfectly sane upon all others, his incompetency to contract is limited to such matters as relate to his particular monomania or hallucination.⁴ It would, however, seem, that the existence of any monomania, when proved, would afford a presumption of incompetency, so as to require of the party claiming to recover against any person affected by it, proof that it did not,

¹ Ersk. Inst. 418 ; 2 Evans's Pothier on Obligations, No. 3 ; *Mitchell v. Kingman*, 5 Pick. R. 431 ; *Seaver v. Phelps*, 11 Pick. R. 304 ; *Rice v. Peat*, 15 Johns. R. 503 ; *Sentence v. Poole*, 3 Car. & Payne, 1 ; *M'Diarmid v. M'Diarmid*, 3 Bligh, N. S. 374 ; *Dent v. Bennet*, 7 Sim. R. 589.

² *Sentence v. Poole*, 3 Car. & Payne, 1 ; *Dunnage v. White*, 1 Wils. C. C. 67.

³ *Hall v. Warren*, 9 Ves. jr. R. 605.

⁴ The general doctrine of Law on this subject was distinctly stated by the learned Chancellor of France, Mons. D'Aguesseau, when advocate general in the Parliament of Paris, in the case of the Prince de Conty. He says : " It must not be a superficial tranquillity, a shadow of repose, but on the contrary a profound tranquillity, a real repose ; not a mere ray of reason, which only serves to render its absence more manifest as soon as it is dissipated ; not a flash of lightning, which pierces through the darkness only to render it more thick and dismal ; not a glimmering twilight, which connects the day with the night ; but a perfect light, a lively and continued radiance, a full and entire day, separating the two nights of the madness which precedes and that which follows it ; and, to adopt another image, it is not a

in the slightest measure, impair the sanity of the latter in respect to the contract.¹ It does not matter, that the person contracting with an insane person is not aware of his insanity at the time when the bargain is made, and acts *bonâ fide*, since the reason, which avoids the contracts of lunatics, is equally as applicable to such a case as to any other.²

§ 11. An idiot differs from a lunatic in that the former is deficient, and the latter is deranged in intellect. Within the class of idiots are embraced not only persons, who are completely imbecile, but those, who are so deficient in mental power as to be incapable of reasoning, or of transacting with understanding the ordinary business of life.³ Mere weakness of mind does not, however, constitute such a deficiency of intellect, as to preclude a party from the right of contracting.⁴

deceitful and faithless stillness, which follows or forebodes a tempest, but a sure and steady peace for a certain time, a real calm and a perfect serenity ; in short, without looking for so many different images to represent our idea, it must not be a simple diminution, a remission of the malady, but a kind of temporary cure, an intermission so clearly marked, that it is entirely similar to the restoration of health. And as it is impossible to judge in a moment of the quality of an interval, it is necessary that it should last sufficiently long to give an entire assurance of the temporary reëstablishment of reason ; this period it is not possible to define in general, and it depends upon the different kinds of madness. But it is always certain that there must be a time, and that time considerable. These reflections are not only written by the hand of nature on the minds of all men, the law also adds its characters in order to engrave them more profoundly in the heart of judges.” 2 Evans’s Pothier on Oblig. No. III.

¹ Attorney-General v. Parnter, 3 Bro. Ch. R. 441. After proof of insanity in the opinion of friends or the common report of the neighborhood, the burden of showing a lucid interval or sanity is on the purchaser. Rogers v. Walker, 6 Barr. R. 371.

² Seaver v. Phelps, 11 Pick. R. 304 ; Baxter v. The Earl of Portsmouth, 2 Car. & Payne, 178.

³ Ball v. Mannin, 3 Bligh, N. S. 1 ; S. C. 1 Dow & Clark, 880.

⁴ Dane v. Kirkwall, 8 Car. & Payne, 679 ; Lewis v. Pead, 1 Ves. jr. 19 ; 1 Story, Eq. Jurisp. § 224, &c.

But although a Court of Common Law would not set aside a contract, because the party was inferior in shrewdness or faculty to the other ; yet if the deficiency on the one side be so great as to have given to the other side an unfair advantage, and it be evident that the weaker party had been overreached, a court of equity would vacate the agreement.¹ In all cases, where a manifest advantage has been taken of a weak-minded person, a court of equity will keenly scrutinize the case, and, under such circumstances, will often set aside a contract, which, if made between persons of a more equal understanding, would be allowed to stand. The ground, upon which a court of equity proceeds in such cases, is not so much that the injured party is incompetent, as that the facts of the case indicate a *fraud*, when practised upon a person of a weak mind ; although in other cases, they would give rise to no such inference.² If, however, no deception can be implied, in such a case, neither party can claim relief in equity ; for to set aside a contract because the parties were not possessed of equal sagacity and knowledge, would be to set aside almost every contract that is made.³

§ 12. So, also, at law, it is not necessary, that the party should be an idiot according to the strict import of that term,

¹ 1 Story, Eq. Jurisp. § 238 ; 1 Fonbl. Eq. B. 1, ch. 2, § 3 ; 21 Am. Jur. 4 ; 3 Wooddesson, Lect. 453 ; Gartside v. Isherwood, 1 Bro. Ch. R. App. 560 ; Dane v. Kirkwall, 8 Car. & Payne, 679 ; McDiarmid v. McDiarmid, 3 Bligh, R. N. S. 374 ; Johnson v. Caldwell, 8 Humph. R. 145.

² McAdam v. Walker, 1 Dow, R. 177 ; Grant v. Thompson, 4 Conn. 208. See Post, § 182 and cases cited ; Blackford v. Christian, 1 Knapp, R. 77 ; Malin v. Malin, 2 Johns. Ch. R. 238 ; Osmond v. Fitzroy, 3 P. Wms. R. 130 ; M'Diarmid v. M'Diarmid, 3 Bligh, N. S. 374 ; 1 Story, Eq. Jurisp. § 234 - 238, and cases cited ; Molton v. Camroux, 2 Excheq. R. 487 ; Suttles v. Hay, 6 Iredell Eq. R. 124.

³ Lewis v. Pead, 1 Ves. jr. 19 ; 1 Story, Eq. Jurisp. § 229, &c. ; Dunnage v. White, 1 Wils. C. C. 67 ; Farnam v. Brooks, 9 Pick. R. 212 ; Mann v. Betterley, 21 Vermt. 6 Wash. R. 325.

in order to entitle him or his representatives to set aside his contract ; but only that he should appear to have been so imbecile or unsound in his mind, as to be incapable of understanding what he was doing in making the contract.¹ Nor does it

¹ *Ball v. Mannin*, 3 Bligh, N. S. 1 ; S. C. 1 Dow & Clark, 880. In this case Lord Tenterden said : “ It was argued by the counsel that the party was not a lunatic, — that is, that he was not at one time of sound mind, and at another time unsound ; but, whatever the state of mind might be, that it was not temporary, but permanent. The Judge told the Jury that the question was, whether the party was of sound mind or not, — and that mode of stating the question was quite correct. He then proceeded to give a definition, ‘ That to constitute such unsoundness as should avoid a deed at law, the party executing such deed must be incapable of understanding and acting in the ordinary affairs of life.’ In that, perhaps, he went too far. The Judge then directed the Jury that ‘ It was not necessary he should be without any glimmering of reason ; and as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him.’

“ The counsel for the defendant then required the Judge to tell the Jury, that in order to avoid the deed at law, the unsoundness of mind must amount to idiocy, according to the strict legal definition of an idiot ; and this being refused, the bill of exceptions was tendered and sealed.

“ It is impossible to read this record without seeing that the point of the objection is this, and this only, — that it was erroneous to direct the Jury to make any other inquiry than this, whether the party was an idiot. If the Judge ought so to have directed, the direction given was erroneous ; but it is impossible so to contend. The Jury were, in substance, directed to inquire whether the party was of unsound mind ; and I find that the Lord Chancellor, according to the authorities, has held that a finding in these terms is sufficient.

“ As to the strict legal definition, I find, in an old book on this subject, that if a person is capable of learning the alphabet, he is not within the legal definition of idiocy ; yet it is impossible to hold that persons no further qualified are capable of executing a deed. The question at law is, whether, in substance, there is such capacity of execution ; and, in effect, the Judge in this case so put the question to the Jury, when he told them that the question was, whether the party was of sound mind or not, and directed them to consider whether he was capable of understanding the deed when explained.

matter, in such a case, that the party dealing with the lunatic or idiot was not aware of his condition, and practised no unfairness or fraud ; for the reason for the rule still obtains, as long as the lunatic is not in possession of sane faculties.¹

§ 13. The old Common Law maxim, that “a man shall not be allowed to stultify himself,”² is now wholly exploded — and it is well established, that idiocy or insanity constitutes a complete defence to a specialty.³ Indeed, it is only astonishing, that a rule so devoid of justice and common sense should ever have been affirmed by an English Court, or that it should have been recognized as well founded by even the technical mind of Lord Coke. Fonblanque has not hesitated to affirm it to be “in defiance of natural justice and the universal practice of all civilized nations in the world.”⁴ And Lord Holt has declared that “it is unaccountable, that a man shall not be able to excuse himself by the visitation of heaven, when he may plead duress from men, to avoid his own act.”⁵ It is entirely evident, that, however closely the law may restrict the right of pleading idiocy or insanity in disaffirmance of a contract, it cannot entirely prevent human beings from being fools and madmen, and unless it

“The observation as to the glimmering, will not make the whole direction erroneous, nor was it irregular or improper when considered in connection with the other parts of the direction to the Jury. In my opinion it was right.” *M'Diarmid v. M'Diarmid*, 3 Bligh, N. S. 374; *Steed v. Calley*, 1 Keen, R. 620; 2 Kent, Comm. 452.

¹ *Seaver v. Phelps*, 11 Pick. R. 305.

² Affirmed by Lord Coke in *Beverly's case*, 4 Co. R. 123; Co. Litt. 147.

³ *Thompson v. Leach*, 3 Mod. R. 301. In this case the doctrine of Lord Coke was challenged with great earnestness and force by the counsel, and overruled by the Court. A writ of error being afterwards brought to reverse the judgment, it was affirmed in the House of Lords. *Shower's Cases in Parl.* 150; *Yates v. Boen*, 2 Strange, R. 1104; *Buller*, N. P. 172; 1 Fonbl. Eq. 46; *Story on Contracts*, § 23.

⁴ *Thompson v. Leach*, 3 Mod. R. 301.

⁵ 1 Fonbl. Eq. 46.

offers to such unfortunates an arm of protection and assistance, they will surely become the prey of the crafty and unprincipled. The English law, through timidity or distrust of change, has not as yet completely emancipated itself from the iron chain of precedent in respect of this class; for, although idiocy or insanity may be pleaded in avoidance of sealed instruments and invalidate them, it does not constitute a complete defence to simple contracts; but is only admitted as stringent evidence of fraud and imposition.¹ Thus, where an action was brought for the use and occupation of a house, taken under a written agreement at a stipulated rent, it was held that it was not sufficient for the plaintiff to show, that the lessee was a lunatic, and that the house was unnecessary for her, but that it must also be shown, that the plaintiff knew this, and took advantage of the lunatic's situation.¹ The contract of the lunatic or idiot in England, therefore, stands upon the same ground as the contract of a sane person, with this modification, that acts and facts will be more keenly sifted in the one case than in the other, and that fraud will be more readily inferred. This rule seems completely in discord with the principle, which forms the ground-tone of all the harmonies of the law relating to contracts, namely, that an intelligent assent is a prerequisite to a power to contract. Indeed, so it has been considered in America, and the doctrine is

¹ *Brown v. Joddrell*, 3 Car. & Payne, 50. In this case, which was assumpsit for work and labor done, and to which lunacy was pleaded as a defence, Lord Tenterden enunciated the doctrine as stated in the text. He says: "I think this defence cannot be allowed, and that no person can be suffered to stultify himself, and set up his own lunacy in his defence. If, indeed, it can be shown, that the defendant has been imposed upon by the plaintiff in consequence of his mental imbecility, it might be otherwise, and such a defence might be admitted." So, also, in *Faulder v. Silk*, 3 Camp. R. 126, Lord Ellenborough affirmed the same doctrine. See *Sergeson v. Sealey*, 2 Atk. R. 412; *Manby v. Scott*, 1 Sid. R. 112; *Sentance v. Poole*, 3 Car. & Payne, 1; *Dunnage v. White*, 1 Wils. C. C. 67; *Molton v. Camroux*, 2 Excheq. R. 487.

² *Dane v. Kirkwall*, 8 Car. & Payne, 679.

firmly established in the United States, that lunacy and idiocy constitute, of themselves, a complete defence to a contract, which may be specially pleaded, or shown under the general issue.¹ It is difficult to perceive the reason of the distinction, which obtains in the English law, between specialties, made by lunatics or idiots, and parol contracts made by them; since the informality and want of deliberation, with which the latter class of contracts are generally made, create ampler opportunities of surprise and imposition than are afforded in the former class, and give the greater advantage to craft and cunning.

§ 14. A modification of the general rule rendering the contracts of idiots and lunatics invalid, is admitted in respect to contracts, which are executed, if they be for necessities, within which term are understood to be included all articles suitable to their rank and condition, although they be not actually necessary. In such cases, if the contract be *bonâ fide* on the part of the other party, it will be enforced, upon the ground, that as the lunatic or idiot has had the benefit of the articles, and no advantage has been taken of him, it is but right and proper, that he should be held liable for them.² But if the con-

¹ Mitchell v. Kingman, 5 Pick. R. 431; Seaver v. Phelps, 11 Pick. R. 304; Rice v. Peat, 15 Johns. R. 503. It has, however, been held in Massachusetts, that "The deed of a person *non compos*, not under guardianship, conveyed a seizin, and was voidable only, but when under guardianship was void." Wait v. Maxwell, 5 Pick. R. 217. See Breckenbridge v. Ormsby, 1 J. J. Marsh. R. 245.

² Baxter v. Earl of Portsmouth, 2 Car. & Payne, 178; S. C. 5 Barn. & Cres. 172. In this case the plaintiffs let certain carriages and harnesses to the defendant to be used by him, in consideration of a certain annual sum. The defendant was a lunatic, but the plaintiffs were not aware of the fact when the contract was made. An action was brought upon the contract, and the evidence at the trial showed that the defendant often used the carriages, and that they were suitable to his rank and condition. The Court thereupon held, that the plaintiffs were entitled to recover. In delivering the judgment of the Court, Abbott, Ch. J., said: "I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient

tract be for articles neither necessary nor suitable for the condition of the lunatic, the mere fact that the contract is executed, will not operate to prevent the lunatic from avoiding it.¹ If the contract be executory, and especially if it be made under circumstances which would have induced the belief in the mind of a reasonable man that the party making it was insane, it would not be enforced, on the ground that such a fact indicated imposition by the sane party. Indeed, the modern cases show a strong analogy between the liability of an infant and that of a lunatic, in respect of their contracts. Both are liable for necessities furnished to them *bonâ fide*, and neither is ordinarily liable on specialties.²

§ 15. *Drunkards.* Contracts made during a state of drunkenness are voidable, upon the ground that it is a state of temporary idiocy, or lunacy.³ The question, whether contracts made by drunken persons were binding, hinged for a long time upon the question, whether the drunkenness were vo-

to defeat the plaintiffs' action. It was brought to recover their charges for things suited to the state and degree of the defendant, actually ordered and enjoyed by him. At the time when the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be that such contracts would bind, although I was not prepared to say that they would not. Upon further consideration I find no reason for thinking that my direction to the jury was erroneous, or that the verdict should be disturbed." See also *Lakue v. Gilkyson*, 9 Barr R. 375.

¹ *Seaver v. Phelps*, 11 Pick. R. 306.

² *Thompson v. Leach*, 3 Mod. R. 310; *Dane v. Kirkwall*, 8 Car. & Payne, 679; *Carbuck v. Bisphane*, 2 Mees. & Wels. 6; *Fisher v. Jewett*, Berton, R. 35; *Baxter v. Earl of Portsmouth*, 2 Car. & Payne, 178.

³ *Pitt v. Smith*, 3 Camp. 33; *Pothier on Oblig.* p. 1, art. 4, § 49; *Corey v. Corey*, 1 Ves. R. 19; *Stockley v. Stockley*, 1 Ves. & B. 30; *Newell v. Fisher*, 11 Smedes & Marsh, 431.

luntary, or occasioned by the contrivance of the other party; for if it were voluntary, and by no default of the other party, it was no excuse. But it is now well settled, that the contracts of drunken persons are voidable, though not absolutely void, however the drunkenness be occasioned.¹ It must, however, be such as to incapacitate the party from the proper exercise of his judgment, and prevent him from understanding his contract.²

§ 16. We now come to the second class of persons, who are incompetent to make contracts. This class comprises those who are legally disabled from contracting, from reasons of public policy and convenience, and we shall subdivide it as follows. 1st, Outlaws and persons attainted; 2d, Aliens; 3d, Infants; 4th, Married women; 5th, Seamen; 6th, Slaves.

§ 17. *Outlaws and persons attainted.* Outlawry creates a complete disability, on the part of the outlaw, to make any personal contract whatsoever, and is equivalent to a civil death. An outlaw may, however, in his representative capacity, bind by his contract his principals, if they be competent to make the contract personally.³ The process of outlawry is, however, almost wholly unknown in this country, and in the few States

¹ Barrett v. Baxton, 2 Aiken R. 167; King's Ex'ors v. Bryant's Ex'ors, 2 Haywood, N. C. R. 394; Dorr v. Munsell, 13 Johns. R. 430; Story on Contracts, § 27, 28; Seymour v. Delancy, 3 Cowen, 445; Reynolds v. Waller's Heir, 1 Wash. 164; Reinicker v. Smith, 2 Har. & Johns. 423; Williams v. Inabnet, 1 Bailey, (S. C.) 343; Arnold v. Hickman, 6 Munf. 15; Taylor v. Patrick, 1 Bibb, 168; Burroughs v. Richman, 1 Green, (N. J.) R. 243.

² Cooke v. Clayworth, 18 Ves. 15; S. C. note to Pitt v. Smith, 3 Camp. 33; Fenton v. Holloway, 1 Stark, N. P. C. 126; Calloway v. Witherspoon, 5 Iredell, Eq. R. 128.

³ 4 Black. Comm. ch. 24, p. 320; 3 Ib. ch. 19, p. 283; Co. Litt. 128 a; Gilb. C. P. 197; Tidd's Prac. (9th ed.) 131; Bacon's Abr. Outlawry; *Ex parte* Franks, 7 Bing. R. 762; 1 Chitty, Crim. Law, 347, 730.

where it exists, it does not entail upon the outlaw the same forfeitures or disabilities as in England. Attainder is wholly unknown in this country, and a bill of attainder is prohibited by the Constitution of the United States.¹ It therefore becomes unnecessary to consider it in this treatise.

§ 18. *Aliens.* An alien is a person born in a foreign country of foreign parents, and not naturalized within his adopted country. The mere fact, that a person is born in a foreign country, will not render him an alien, if his parents are not subjects of such country, but are merely journeying or temporarily residing there.² But the children of a mother, married to a foreigner, who are born abroad, are aliens.³ So, also, the children born of a person in the service, and under allegiance to a foreign Prince or King, or of a person who has been naturalized, are aliens. The children of aliens, born in America or in England, are entitled to all the privileges of natural born citizens.⁴ This rule does not, however, obtain in France, unless the child, after attaining the age of twenty-one years, claim the character of a Frenchman, by declaring, if not then resident in France, his intention to fix his residence there, and actually so doing within a year of his declaration.⁵

§ 19. An alien friend is competent to contract with a citizen, either within or without the country; and, during peace, he has the same privileges and rights in enforcing his contract by legal process in the Courts of the foreign country, as if he were a citizen.⁶ During war, the citizens of the belligerent countries

¹ Constitution of U. S. Art. III., § 3; Art. I., § 9, 10.

² *Wilson v. Marryat*, 8 T. R. 31; S. C. 1 Bos. & Pul. 430. In *Re Bruce*, 2 Crompt. & Jerv. 436.

³ *Duroure v. Jones*, 4 T. R. 300.

⁴ 1 Black. Comm. 371.

⁵ Code Civile, L. 1, tit. 1, § 9.

⁶ Bac. Abr. Alien, D; Story on Contracts, § 34.

cannot make a valid contract, unless the alien enemy reside within the country of the citizen with whom he contracts, and be within the license and protection of the government, in which case his contract can be enforced ; or unless it be made with the permission of the government, or be for ransom money.¹ Not only the citizens of two countries at war with each other are considered as alien enemies, but a neutral, voluntarily residing in either country and carrying on commerce there, is an alien enemy to the other country.² And this rule obtains, although such neutral be resident in the enemy's country in the character of consul of his State.³ The rights of an alien to sue in the Courts of a foreign country upon a contract made during peace are suspended during war, but they revive upon the recurrence of peace.⁴ A contract between a neutral and a citizen in an enemy's country is, however, valid, and may be enforced by legal process in the Courts of the United States and of England.⁵

§ 20. *Infants.* By the Common Law, every person is an infant, and is incapable of making any binding contract in his own behalf until he is twenty-one years of age, although he can, after fourteen years of age, become an executor and administrator, and make voidable contracts. The age, at which a person is competent to make a valid contract, is different in different countries. By the Roman Law, full age is fixed at

¹ Com. Dig. Alien, C. 5 ; *Griswold v. Waddington*, 15 Johns. 57 ; S. C. 16 Johns. 438 ; *Musson v. Fales*, 16 Mass. R. 334 ; *The Francis & Cargo*, 1 Gallison, R. 448 ; *The Rapid*, 8 Cranch, R. 155 ; *The Alexander*, 8 Cranch, R. 169 ; *The Julia*, 8 Cranch, R. 181.

² *O'Mealey v. Wilson*, 1 Camp. R. 482.

³ *Albrecht v. Sussman*, 3 Ves. & Beam. 323.

⁴ *Ex parte Boussmaker*, 13 Ves. R. 71 ; *Flindt v. Waters*, 15 East, R. 260 ; 7 Taunt. R. 439 (Am. ed.) and note ; *Wells v. Williams*, 1 Salk. R. 46 ; *Boulton v. Dobree*, 2 Camp. R. 163.

⁵ *Houriet v. Morris*, 3 Camp. 303. See also, Post, § 503.

twenty-five years, and this rule generally obtains on the Continent of Europe.¹ In France, majority is attained at the age of twenty-one years.² But in all countries, and by all codes, a certain definite age is fixed as the period at which all persons shall acquire a full power to make contracts, and to assume a reciprocal liability upon them, and before which, out of regard for the immaturity of power, the susceptibility to undue influence, and the trusting spirit of youth, the law interferes to guard and protect them against artifice and fraud, by restricting their liabilities, and empowering them to annul their contracts. The powers and faculties of different persons are developed and matured at different periods, and in many cases can be scarcely said to be ever developed; but some arbitrary rule, defining a particular age as the age of majority, becomes necessary, in order to prevent litigation and endless doubt. The rule of the Common Law of England, which fixed this period at twenty-one years, has by some writers been thought to have originated in the feudal law, by which the authority of the guardian in chivalry existed until the male ward was twenty-one years of age, at which time he became capable of doing knight-service, and attended his lord to the wars.³ But Sir William Blackstone suggests, that this rule was probably copied from the old Saxon constitutions on the Continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt.*"⁴ This rule obtains

¹ Inst. 1, 23, 1; Partidas on Obligations, 5, 11, 5; Inst. of the Civil Law of Spain, b. 1, tit. 1, ch. 1, sec. 3; Inst. of the Law of Holland, by Van der Linden, book 1, ch. 5, § 7; Code Civile, Art. 388, 488. See 2 Kent, Comm. Lect. 31, p. 234.

² Code de France, Art. 488.

³ Bac. Abr. Infancy and Age, A. 1; Co. Litt. 78, *b*, 171, *b*. See Bingham on Infancy, and Macpherson on Infancy, for a full discussion of the rights and liabilities of Infants.

⁴ 1 Black. Comm. 464. See also a curious article on The Number Seven in Vol. 6 Law Reporter, 529-540. Homo, says Pliny, *crescit in longitudinem ad annos usque Ter Septenos*, and this may have been the original root of the rule.

generally throughout the United States, although, in some of the States, female infants attain their majority at the age of eighteen years.¹ A person may bind himself by a contract made on the day previous to his twenty-first birth day; and it has been held, that “if one be born on the first day of February at eleven at night, — and on the last day of January in the twenty-first year of his age, at one o’clock in the morning, he make a will of land, it is a good will, for he was then of age.”²

§ 21. The principle governing contracts of infants with adults, differs from that which governs other contracts;³ for in the former case, the adult will be bound, although there be no reciprocal obligation on the part of the infant; while in respect of contracts generally, the rule is, that they are only valid when there is a valuable consideration on both sides.⁴ This exception proceeds upon the assumption, that the adult is possessed of sufficient knowledge and experience to protect himself from fraud, while the infant, from his ignorance and inexperience, is supposed not to be upon an equal footing with him. The adult, therefore, is liable to the same extent as if his contract were not with an infant, but the infant has the privilege of avoiding it. This privilege is entirely personal, and can only be exercised by the infant himself; no third person can, therefore, take advantage of the infancy of one of the parties to

¹ This is the case in Vermont and Ohio. 9 Vermont, R. 42, 79; 2 Kent, Comm. Lect. 31, p. 231.

² Anon. 1 Salk. R. 44; *Roe v. Hersey*, 3 Wilson, R. 274; *Fitzhugh v. Dennington*, 6 Mod. R. 260; Sir Robert Howard’s case, 2 Salk. R. 625; 2 Kent, Comm. Lect. 31, p. 232; *Hamlin v. Stevenson*, 4 Dana, (Ken.) R. 297.

³ Louisiana follows the common law in this respect, although the civil law is generally administered there. *Barrera v. Alpuente*, 18 Martin, Louis. R. 9; Civil Code of Louisiana, art. 41, 93.

⁴ *Duranton*, Droit, Français, Vol. 16, Du Contrat de Vente, § 126.

avoid a contract.¹ But, inasmuch as the remedy is not reciprocal, a Court of Equity will refuse to decree a specific performance by the adult, at the instance of the infant.² So, also, in all cases where infancy is pleaded as a defence to a contract, the proof thereof lies upon the defendant.³

§ 22. The contract of an infant consists of three classes: First, those which are absolutely injurious to his interests, and can only operate to his prejudice; such as a bond given by him as surety; these are absolutely void. Second, those which may be beneficial to his interests; and these are merely voidable by him when he arrives at majority. Third, those which administer to his needs and necessities; those which he is authorized by statute to make; those which are made by him in his representative capacity; and executed contracts of marriage; all of which are binding upon him.⁴ The first class embraces, principally, instruments under seal, which do not come within the scope of the present treatise. Within the second and third classes are included all the contracts relating to the purchase and sale of personal property. Indeed, by far the greater part of the contracts made by an infant are included

¹ *Keane v. Boycott*, 2 H. Black. R. 511; *Coan v. Bowles*, 1 Shower, R. 171; *Von Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. R. 160; *Rose v. Daniel*, 2 Const. (S. C.) R. 549; *U. S. v. Bainbridge*, 1 Mason, R. 71; *Oliver v. Houdlet*, 13 Mass. R. 237; *Nightingale v. Withington*, 15 Mass. R. 272; *Kendall v. Lawrence*, 22 Pick. R. 540.

² *Flight v. Bolland*, 4 Russ. R. 298.

³ *Jeune v. Ward*, 2 Stark. R. 293; S. C. 1 Barn. & Ald. 653; *Leader v. Barry*, 1 Esp. R. 553.

⁴ By the Scottish Law, a minor, *who has no curator*, may bind himself by deed, which will be valid and effectual in all respects. His deeds are, indeed, liable to reduction on the ground of minority and lesion, in cases where the infant has been injured, but not on the ground of minority alone. A minor, *who has curators*, cannot make a deed without their consent, and may plead his infancy in defence to a deed so made. *Ersk.* 1, 7, 33; *Brown on Sales*, p. 168, § 245, 246; *Stair*, 1, 6, 33.

in the latter classes; for the policy of the law is not to annul the power of the infant to contract, but to give him the option of affirming or disaffirming his contracts upon his arriving at majority, according as they may seem to him beneficial or injurious.¹

§ 23. An infant is not bound to perform his executory contracts during his infancy, although he may have received and enjoyed the consideration, upon which they were founded. If therefore, he borrow money and spend it; or purchase goods, which are not necessities, and part with them or consume them; or make a promissory note; he is not liable.² So, also, if he undertake to do a certain act, and receive a certain sum of money therefor, in advance, he cannot be compelled to perform his promise, after he has parted with the consideration, nor can the money be recovered from him, for it was the folly of the other party to trust him.

§ 24. But, although, where the contract is executory on the part of the infant, and executed on the part of the adult, and is not in respect of necessities, the infant may refuse to perform his promise during his infancy, or may disaffirm it on arriving at full age, yet this rule only obtains in those cases where the consideration has been parted with or consumed by him.³ For

¹ *Tucker v. Moreland*, 10 Peters, R. 71; 2 Kent, Comm. Lect. 31, p. 234, 235; *Zouch v. Parsons*, 3 Burr. R. 1804; *Reed v. Batchelder*, 1 Metcalf, R. 559; *Williams v. Moor*, 11 Mees. & Welsb. 256; *Whitney v. Dutch*, 19 Mass. R. 457.

² 20 Am. Jurist, 257, 260; Story on Cont. § 40, 42; *Shaw v. Boyd*, 5 Serg. & Rawle, 309; *Crymes v. Day*, 1 Bailey, R. 320; *Jones v. Todd*, 2 J. J. Marsh. 361; *Goodsell v. Myers*, 3 Wend. 479; *Lawson v. Lovejoy*, 8 Greenl. R. 405; *Whitney v. Dutch*, 14 Mass. 462; *Probart v. Knouth*, 2 Esp. R. 472, note; *Earle v. Peale*, 1 Salk. R. 386; *Darby v. Boucher*, 1 Salk. R. 279.

³ *Probart v. Knouth*, 2 Esp. R. 472, note; *Earle v. Peale*, 1 Salk. R. 386; *Darby v. Boucher*, 1 Salk. R. 279.

if he retain the identical and specific consideration, and it can be identified, he becomes the trustee of the other party, as soon as he disaffirms his contract, or refuses to perform it, and is bound to surrender it.¹ The reason of this distinction is, that in the one case, it would be impossible for him to return the consideration, and to render him liable therefor in damages would be to annul his privilege; but, in the other case, he would be guilty of a positive fraud in retaining, against the will of the other party, that for which he refuses to give any consideration, and to which he therefore is not justly entitled. Besides, upon the disaffirmance of his contract, the infant stands in the same position that he would if no contract had ever been made, and his rights remain the same as they did before his contract.² If, then, the consideration be gone, the party, who assumed the risk, ought to suffer the loss. But if it remain, it is still the property of the party who advanced it.

§ 25. This rule operates, however, in some measure reciprocally; for if the infant have advanced money or any other consideration, which has been consumed or parted with by the other party, and afterwards disaffirm his contract, he cannot, if he have received any benefit therefrom, recover from the other party the advanced consideration.³ If, therefore, he should purchase a watch, and pay for it, he could not, by disaffirming his contract, and offering the watch in return, found any claim to recover the sum paid by him; or if he should ad-

¹ *Badger v. Phinney*, 15 Mass. R. 359; *Willis v. Twambly*, 13 Mass. R. 204; *Reeve's Domestic Relations, Parent and Child*, 245.

² *Shannon v. Shannon*, 1 Sch. & Lef. 324; *Badger v. Phinney*, 15 Mass. 359; *Illsley v. Stubbs*, 5 Mass. 284.

³ 2 Kent, Comm. Lect. 31, p. 240; *Holmes v. Blogg*, 8 Taunt. 35, 508; S. C. 1 Moore, 466; *Earl of Buckinghamshire v. Drury*, 2 Eden, 72; S. C. *Wilmot*, R. note, 226; *M'Coy v. Huffman*, 8 Cowen, 84; *Roof v. Stafford*, 7 Cowen, 184; *Weeks v. Leighton*, 5 New Hamp. R. 313; *Wilson v. Kease*, *Peake's New Cas.* 190; *Corpe v. Overton*, 10 Bing. R. 252.

vance money upon a lease, and afterwards disaffirm his contract, he could not sue for the money advanced.¹ So, also, he could not buy a large quantity of corn or grain, and after reselling or consuming a portion, disaffirm his contract, and by returning the remaining portion, acquire a right to sue the other party for a proportional part of the price.²

§ 26. Nor is an infant bound by his executed contracts, provided, that it be possible, in fact, for the other party to replace him in the same condition in respect to the matter, as that in which he was before the contract.³ But he can only disaffirm his executed contracts, upon offering to return the consideration which was advanced to him ;⁴ for the law will not allow him to use his privilege as a weapon of injury, but only as a means of defence. If, however, it be impossible for the other party to return to the infant the executed consideration, the infant cannot sue him therefor and recover damages. Thus, if an infant sell any article to an adult, and receive payment therefor, he may nevertheless reclaim it, upon tendering the price which was paid for it ;⁵ but he cannot reclaim the article, without offering to refund the money.⁶ If, however, the adult have parted with the article, and cannot resume possession of it, he is not responsible for it, because he could only be liable in damages, which would be the money already in the hands of the infant.

¹ *Holmes v. Blogg*, 8 Taunt. R. 35 ; *S. C.* 1 Moore, R. 466 ; 2 Moore, R. 552.

² *Ibid.*

³ *Willis v. Twambly*, 13 Mass. R. 204 ; *Badger v. Phinney*, 15 Mass. R. 359 ; *Hubbard v. Cummings*, 1 Greenl. R. 13 ; *Roof v. Stafford*, 7 Cow. R. 183 ; *Blunden v. Baugh*, Cro. Car. 303, 306 ; *Jackson v. Carpenter*, 11 Johns. R. 539 ; *Jackson v. Burchin*, 14 Johns. R. 124.

⁴ 2 Kent, Comm. Lect. 31, p. 240 ; *Earl of Buckinghamshire v. Drury*, 2 Eden, R. 72 ; *Badger v. Phinney*, 15 Mass. R. 359.

⁵ *Willis v. Twambly*, 13 Mass. R. 204.

⁶ *Badger v. Phinney*, 15 Mass. R. 359.

§ 27. No one can, however, plead infancy as a defence to actions founded in *tort*, or in positive fraud ; but only in actions founded in contract.¹ If the matter be founded purely in *tort*, *assumpsit* is an improper action, and cannot be maintained. If the matter be founded purely in contract, an action of *tort* cannot be maintained.² In *assumpsit* the infant may ordinarily plead his infancy in bar; but if it be really founded in *tort*, the Court will overlook the impropriety of the pleadings, and deprive the infant of such a defence.³

§ 28. Fraud vitiates all contracts, whether of infants or adults ; and infancy will not avail as a defence to an action founded therein. If, therefore, the infant, by fraudulent representations, induce any person to sell him goods, he will be liable in an action of trover for their value.⁴ The law, in such cases, proceeds upon the doctrine, that the fraud annuls the contract, and leaves the infant in the position of a wrong-doer, who has improperly obtained possession of the goods of another.

¹ See Story on Contracts, § 45, 46, and note, where this subject is fully discussed. *Homer v. Thwing*, 3 Pick. R. 492 ; *Bristow v. Eastman*, 1 Esp. R. 172 ; *Mills v. Graham*, 4 Bos. & Pul. 140 ; *Peigne v. Sutcliffe*, 4 McCord, R. 357 ; *Vasse v. Smith*, 6 Cranch, R. 226 ; *Jennings v. Rundall*, 8 T. R. 337 ; 2 Kent, Comm. Lect. 81, p. 240, 241.

² *Jennings v. Rundall*, 8 T. R. 337.

³ *Vasse v. Smith*, 6 Cranch, R. 226 ; *Bristow v. Eastman*, 1 Esp. R. 172 ; S. C. Peake's Cas. 225. In this case an infant was held to be liable for money received by him as an apprentice, and misapplied or embezzled, although the action was *assumpsit*. See also *Furnes v. Smith*, 1 Roll. Abr. 530, where a suit was held to lie against the master of a ship, (who was an infant, though the fact was apparently unknown to the shipper,) for goods which he contracted to carry to England, and did not deliver according to his agreement, having wasted or consumed them, and the court of common law refused a prohibition.

⁴ Ross on Vendors, p. 102 ; Story on Contr. § 46, and note (1) ; *Vasse v. Smith*, 6 Cranch, R. 226 ; *Badger v. Phinney*, 15 Mass. R. 359 ; *Hubbard v. Cummings*, 1 Greenl. R. 13 ; *Stoolfoos v. Jenkins*, 12 Serg. & Rawle, R. 399-403 ; *Word v. Vance*, 1 Nott & McCord, R. 197.

Thus, if an infant falsely represent himself to be of age, and on faith thereof, any person sell him goods, the vendor may retake the goods, or sue him for damages. He should not, however, bring an action of *assumpsit*, for thereby he incidentally affirms his contract, and his rights being founded upon its nonexistence, the form of his action gives color to the defence of the infant. The negligence in not bringing an action of *trover* in such cases, has often led to a judgment on the pleadings and not on the merits of the case. And a want of discrimination in respect to this circumstance, has induced an opinion, that in cases of fraud, infancy was a valid defence. Such a doctrine cannot be sustained, however, upon principle, nor even upon precedent.¹

¹The old cases, which seem to impugn this doctrine, will not, upon a thorough examination, prove to be irreconcilable with it, in most cases at least. The case of *Grove v. Nevill*, (1 Keble, R. 778, 913, 914,) which has formed the basis of the subsequent decisions on this subject, was an action on the case against an infant for selling goods as his own, which belonged, in fact, to another. The infant pleaded his nonage, but the Court held, that there was no actual *tort* or any thing *ex delicto*, but only *ex contractu*, which is voidable by plea, but is a *tort* by construction of law. The Court were, however, divided, and Wyndham doubted. The case proceeds upon the ground, that an infant cannot be liable in *tort* upon a matter strictly of contract, which is undoubtedly a correct rule of law, but the majority of the Court took it for granted, that this question arose in contract. This was not, however, the fact, for by one of the commonest principles of law, the fraud destroyed the contract, and therefore the infant could only have held the goods in *tort*, both in fact, and by construction of law. We cannot, therefore, but reverence the sagacious doubt of Wyndham, and deem it to be more worthy of confidence than the decision of the Court. The next case was *Manby v. Scott*, (1 Sid. 129,) which affirms, that "If one deliver goods to an infant on a contract, *knowing him to be an infant*, the infant shall not be charged for them in *trover* and conversion;" but a quere is raised, whether, if the "goods were delivered to an infant, *not knowing him to be an infant*," it would not be otherwise. This quere is even stronger than the doctrine contended for in the text; since it suggests, that the *mere ignorance* of the seller of the fact of infancy, would be sufficient to enable him to bring an action in *trover* against the infant. Of course, if there were actual *misrepresentation*

§ 29. Those contracts of an infant, which are void in their origin, can never acquire validity by his subsequent act or

sentation and fraud, the suggestion would acquire therefrom redoubled force. This case did not, however, turn upon the liability of the infant.

The next case is that of *Johnson v. Pie*, 1 Keb. R. 905, 913; 1 Sid. R. 258; 1 Lev. 169, where an infant executed a mortgage, falsely affirming himself to be of age, which he afterwards sought to avoid, and pleaded his infancy to an action on the case brought against him by the mortgagee. The Court sustained his plea, upon the ground, that "The affirmation being by an infant was void, and was not like trespass, felony, &c., for there is a fact done." Twisden, J., doubted, and thought the infant liable in like manner as he would be for trespass, or cheating with false dice. Again, we are inclined to consider the doubt of the dissentient judge to be of far more value than the decision of the Court. The Equity of his doubt is manifest, and we believe it to be also well founded in law. The affirmation was an absolute lie, and as it was portion of the consideration of the contract, or at least, must have had a direct influence on the mind of the mortgagee, its falsity rendered it a clear and unpardonable fraud, for which he ought to make reparation, and which the law affirms in all cases to be poison to a contract. Nor is any reason apparent why an infant should be justified in such a case for so mean and contemptible an act. Besides, the law, in remitting to him all liability, in case of his direct fraud, offers to him an incitement and premium for his baseness. Where a contract is founded upon a fraudulent representation, the fraud is, of course, antecedent to the contract, and lies at the root of every question arising thereupon. If a suit be brought, therefore, upon such a transaction, it must have for its foundation, the tort or fraud. In this case of *Johnson v. Pie*, the decision proceeds upon the assumption, that the affirmation of the infant was void; if this be so, the contract also was void, for it was founded upon such affirmation as a consideration, and it is a universal rule, that no contract can be supported on a void consideration. If, then, there be no contract, what right has the infant to the goods; he is a *tortfeasor*, having by fraud got possession of the property of another; and the other party has surrendered it without negligence, without undertaking to assume any risk, but merely in the faith that the representation of the person to whom he sold them, is true, whereas it is, in fact, false. In this case, the action was a proper one also, and the plausible but unsound reason could not be given, that the form of the action affirmed the contract, as it would if the action had been *assumpsit*. Even this objection, however, ought not to be sustained, (see note 5, section 27.) In *Mills v. Graham*, (4 Bos. & Pul. 140,) Sir James Graham affirmed the doctrine contended for. In that case, the defendant, being an infant, applied to the

word,¹ but those, which are only voidable may acquire binding force by a ratification by him, upon his coming of full age. Before majority, no binding ratification of an agreement can be

plaintiff to sell him some skins, which the plaintiff refused to do, but agreed to let him have some to finish, and promised to pay him therefor. The plaintiff some time afterwards requested the defendant to return the skins, and offered to pay what was due upon them ; but the defendant refused, and claimed to hold them, and set up a plea of infancy. An action was there-upon brought, and Sir James Mansfield held, that detinue or trover would lie, and said : “ He (the defendant) fraudulently received the goods, concealing the circumstances of his minority, and then fraudulently set up his minority as a defence against the plaintiff’s just demand. The goods being wrongfully in the defendant’s hands from the beginning, *without any valid contract* between him and the plaintiff, it seems, that they must be considered in the same situation as if the defendant had at first wrongfully got possession of them without pretence of bailment.” “ It is sufficient to say, that the goods did not come to the defendant under what properly could be called a bailment. They came into his hands by fraud, and the right of the plaintiff must be considered just the same as if the goods had come to the defendant’s hands without pretence of right or delivery.” The case of *Jennings v. Rundall*, (8 T. R. 335,) was this. An infant hired a horse and injured him, not through malice, but through his ignorance and inexperience. And an action *ex delicto* was brought for the injury, alleging a wrongful and malicious intent. The Court said, that the matter was one purely of contract, and could not support an action *ex delicto*. This was very true in that case, for it did not appear that the infant had made any fraudulent misrepresentation, or that the latter was ignorant of his infancy, and, therefore, the case stood upon the general ground, which throws the risk of all contracts, made with an infant, upon the other party. See also *Manby v. Scott*, (1 Sid. R. 109, 129,) under Resolution (2), where the same point was adjudged. But see *Campbell v. Stokes*, 2 Wend. R. 137, where it was held that in such a case an infant would be liable in an action of trespass. This case was denied to be law in *Webb v. Welch*, 6 Wall. R. 9, but is cited and approved in *Fitts v. Hall*, 9 N. Hamp. R. 441 ; and by Chancellor Kent in his Commentaries, 2 Kent Comm. Lect. xxxi, p. 241, note.

The rule is well established in Equity, that infancy is no defence to cases of fraud, and that a fraudulent misrepresentation will bind an infant. See 1 Story, Eq. Jurisp. § 385, and cases there cited ; 1 Fonbl. Eq. B. 1, ch. 3, § 4 ; *Savage v. Foster*, 9 Mod. R. 35 ; *Bright v. Boyd*, 1 Story, R. 478 ;

¹ *Cockshott v. Bennett*, 2 T. R. 766.

made, except, perhaps, in the case of a suit by a minor against an adult, on a contract not executed by the minor; and this exception is allowed upon the ground, that, otherwise, the

Earl of Buckinghamshire *v.* Drury, 2 Eden, R. 74; Watts *v.* Cresswell, 9 Viner, Abr. 415; Clare *v.* Bedford, 13 Viner, Abr. 536; S. C. cited 2 Vern. 150; Evroy *v.* Nicholas, 2 Eq. Abr. 448; Cory *v.* Gertcken, 2 Madd. R. 40; Clarke *v.* Goble, 2 Cox, R. 173.

In the United States there is a very strong inclination in the Courts of Common Law to support the doctrine, which obtains in Equity, and to hold an infant liable on all cases, where he makes a fraudulent misrepresentation or concealment of his age, and thereby obtains goods or money. In Vasse *v.* Smith, (6 Cranch, 226,) it was held by the Supreme Court of the United States, that where an infant possessed goods under a contract of consignment to him, to be sold at Norfolk by him, and he wrongfully shipped the same to the West Indies, he was liable in trover for the conversion. In Badger *v.* Phinney, (15 Mass. R. 359,) the Supreme Court of Massachusetts held, that where goods were obtained by an infant, upon a false affirmation, that he was of age, that the vendor might recover them. So also in Homer *v.* Thwing, (3 Pick. R. 492,) it was held, that trover lay against an infant who hired a horse to drive to one place, and drove him to another. But see contra Will *v.* Welsh, 6 Watts R. 9. In Hubbard *v.* Cummings, (1 Greenl. R. 13,) the doctrine of Badger *v.* Phinney was sustained. See also, Stoolfoos *v.* Jenkins, 12 Serg. & Rawle, R. 399 - 403, where it is said, that in cases of gross fraud by the infant, he could not avoid his contract. In Wallace *v.* Morse, 5 Hill R. 391, it was held that an infant who had obtained goods fraudulently, without intending to pay for them, was liable. See also Green *v.* Sperry, 16 Vermt. R. 393; Lewis *v.* Littlefield, 15 Maine R. 236; Penrose *v.* Currex, 3 Rawle, R. 351; Schenks *v.* Strong, 1 South. (N. J.) R. 87; Fitz *v.* Hall, 9 N. H. R. 441; 10 Am. Jurist, 98; 11 Ibid. 69; 20 Ibid. 269.

The remarks of Mr. Justice Duncan, in Austin *v.* Patton, 11 Serg. & Rawle, are mere *obiter dicta*, not called for in the case. In Conroe *v.* Birdsall, (1 Johns. Cas. 127,) it was held, that an infant who had given a bond was at liberty to avoid it, if he chose, although it appeared, that there had been a fraudulent misrepresentation by him of his age, in answer to an inquiry by the other party in respect to that point. The court say, however, "We have no doubt of the principle adopted by the judge at the trial, that the disabilities of infants are intended to protect them from injury and imposition, and not to aid them in practices of fraud or collusion; but on consideration, we are of opinion, that its application to the conduct of the defendant

contract would be without consideration.¹ But on the infant's arriving at majority, he may ratify any contract which is not originally void.

§ 30. Acts and words, which would operate as a ratification of an executed contract, would not, in all cases, be sufficient to ratify an executory contract. All that is requisite in the former class of cases is, an unequivocal acknowledgment of indebtedment or liability. Indeed, a mere acquiescence in the contract or silence in respect to it, is considered as a sufficient ratification. This is especially the case with all contracts, the consideration of which, on the part of the adult, is continuing, and from which the infant receives a continuing benefit. Wherever his position is such, that his silence can only be properly explained upon the supposition of an acknowledgment of the contract, it will be a sufficient ratification of his executed contracts.² He is

in the case before us, so as to charge him with this debt, would tend to endanger all the rights of infants, and ought not to be admitted. The bond in this case must be supported *in toto*, or not at all, and no decision can be found which carries the doctrine of fraud or its effects, in relation to infants at common law to this extent." The principle here enunciated we heartily acquiesce in, but it is difficult to see why it did not apply to the case, which was one completely within every legal definition of fraud. The consideration did not appear in the report, and there may have been a reason for the decision founded therein. In *Stoolfoos v. Jenkins*, (12 Serg. & Rawle, 399,) it is intimated, that in cases of gross fraud by the infant, he could not avoid his contract. In *Word v. Vance*, (1 Nott & McCord, 197,) it was held, that infancy was no defence to an action, *ex delicto*, for a false warranty in the sale of a horse. But see *Morrill v. Aden*, 19 Vermt. (9 Washburn) R. 505, where it is held, that infancy is a good bar to an action founded on a false or fraudulent warranty in the sale of a horse, whether such action be in form *ex delicto* or *ex contractu*.

¹ Newland on Cont. 14, *sed quære*; *Zouch v. Parsons*, 3 Burr. R. 1808; *Forrester's Case*, 1 Sid. R. 41; *Reeve's Domestic Relations*, Parent and Child, 249, 254.

² *Brown v. Caldwell*, 10 Serg. & Rawle, 114; *Holmes v. Blogg*, 8 Taunt. R. 35; S. C. 1 Moore, R. 466; *Goode v. Harrison*, 5 B. & Ald. 147; *Lawson v. Lovejoy*, 8 Greenl. R. 405; *Ashfield v. Ashfield*, W. Jones, R. 157,

however, allowed a reasonable time, after he comes of age, *locus penitentiæ*, during which his mere acquiescence will not be considered as a ratification of his contracts, unless it be connected with circumstances unequivocally establishing an intention on his part to ratify them.¹ But in the latter class of cases, any mere acknowledgment of liability is insufficient, because the infant may admit the debt and yet refuse to pay.² It becomes necessary, therefore, in order to ratify an executory contract, that he directly recognize and confirm it, by a new and express promise, deliberately made, with a full understanding that he is not otherwise legally liable thereupon.³ Even a partial payment of a debt is not a sufficient ratification of the whole debt; because it is not thereby proved that the minor intended to pay more than a portion of the debt.⁴ It is not necessary for him to use any particular form of words, however, provided that the expression he employs contain a certain and unequivocal promise, and be not solely an admission of liability.⁵ The only exception to this rule obtains in respect of a promise by an infant to marry, in which circumstances and conduct indi-

affirmed in the Exchequer Chamber by all the Judges; *S. C. Latch*, R. 199; *Godb. R.* 364; *Smith v. Low*, 1 Atk. R. 489; *Cheshire v. Barrett*, 4 McCord, R. 241; *Lynde v. Budd*, 2 Paige, R. 191; *Hubbard v. Cummings*, 1 Greenl. R. 11; 20 Am. Jur. 273, and cases cited.

¹ *Tucker v. Moreland*, 10 Peters, R. 75; *Jackson v. Carpenter*, 11 Johns. R. 542; *Holmes v. Blogg*, 2 Moore, R. 552.

² *Lara v. Bird*, cited in *Peake on Evid.* (2d ed.) 260; *Whitney v. Dutch*, 14 Mass. R. 460; *Martin v. Mayo*, 10 Mass. R. 137.

³ *Thompson v. Lay*, 4 Pick. R. 49; 2 Kent, Comm. 237, and notes; *Hussey v. Jewett*, 9 Mass. 100; *Ford v. Phillips*, 1 Pick. R. 203; *Harmer v. Killing*, 5 Esp. R. 102; *Smith v. Mayo*, 9 Mass. R. 64; *Robbins v. Oits*, 1 Pick. R. 368; *Thrupp v. Fielder*, 2 Esp. R. 628; *Dilk v. Keighley*, 2 Esp. R. 481; *Whitney v. Dutch*, 14 Mass. R. 460; *Hubbard v. Cummings*, 1 Greenl. R. 11; *Hinely v. Margaritz*, 3 Barr R. 428.

⁴ *Thrupp v. Fielder*, 2 Esp. R. 628; *Ford v. Phillips*, 1 Pick. R. 202.

⁵ *Thompson v. Lay*, 4 Pick. R. 48; *Whitney v. Dutch*, 14 Mass. R. 460.

cating a continuing intention to fulfil the contract, are a sufficient ratification.¹

§ 31. If, however, the ratification be exacted from him by fraud, or if he be induced to make it under a mistake, or through fear, or duress, or in ignorance of his legal rights, it is void.²

§ 32. We now come to the third class of contracts, which are absolutely binding upon an infant. This consists, First, of contracts made under the express authority of statutes ; such as contracts of apprenticeship, and enlistment in the army and navy ;³ Second, of executed contracts of marriage ;⁴ Third, of contracts in *autre droit* ;⁵ and Fourth, of contracts *for necessities*. The last class alone concerns the subject of the present treatise, and our consideration will, therefore, be restricted to it.

§ 33. The Common Law, in a truly parental and affectionate exercise of its common sense, having affirmed, that “an infant must live as well as a man,” has felt itself bound to afford him an opportunity of availing himself of so salutary a maxim. It,

¹ 2 Stark. Ev. 941 ; Hutton v. Mansell, 3 Salk. R. 16, 64 ; S. C. 6 Mod. 172 ; Wightman v. Coates, 15 Mass. R. 1 ; Bobo v. Hansell, 2 Bailey, R. 114.

² Hussey v. Jewett, 9 Mass. R. 100 ; Ford v. Phillips, 1 Pick. R. 203 ; Brooke v. Gally, 2 Atk. R. 34 ; Harmer v. Killing, 5 Esp. R. 102. See Post, *Mistake*.

³ U. S. v. Bainbridge, 1 Mason, R. 71 ; Commonwealth v. Harrison, 11 Mass. R. 65 ; U. S. v. Anderson, Cooke, R. 143 ; Commonwealth v. Murray, 4 Binn. R. 487 ; Rex v. Arundel, 5 Maule & Selw. 257 ; Story on Contr. 553 ; People v. Moores, 4 Denio, R. 518.

⁴ Co. Litt. 79, *b*, and notes 45 & 49 ; Bac. Abr. Infancy and Age, A ; 1 Black. Comm. 462.

⁵ King v. Inhabitants of Great Wigston, 5 Dowl. & Ry. 339 ; S. C. 3 Barn. & Cres. 484.

therefore, has not contented itself with enunciating a naked proposition, but has invested the infant with a power of availing himself thereof, by giving him authority to make contracts for necessities, and to bind himself thereby.¹

§ 34. The legal term, "necessaries," is not restricted to the absolute necessities of life, but embraces all those articles, which are suitable to the condition, rank, fortune, and general needs of the infant. The law does not insist, that all persons shall live alike, whatever be their condition in life, but admits those things to be "necessaries," which are either requisite or appropriate.² Thus, horses, jewelry, lodgings, regimentals, and servants' liveries, have been held to be necessities in particular cases.³ So, also, where an apprentice to a chemist, who was entitled to some property when he should come of age, bought a horse when he was nearly of age; it was held, that as he had been advised by a medical man to take exercise on horseback,

¹ Bacon, Abr. Infancy (I) 1; Com. Dig. Infant (B) 5; *Rainsford v. Fenwick*, Carter, R. 215; *Hands v. Slaney*, 8 T. R. 578; *Harrison v. Fane*, 1 Scott, N. R. 287. By the Scottish law, a minor who has curators may make an effectual contract, without their consent, for *necessary furnishings* of clothes, or other articles. Brown on Sales, § 247, p. 169; Stair, 54. So, also, a minor without curators may make himself liable for furnishings, ordered by him, not for himself, but for his brothers and sisters, he retaining a right of action against them for repayment. Brown on Sales, § 248, p. 169. If he be *foris familiaris*, and engaged in a profession or trade, so as to be his own master, he is liable for furnishings not strictly necessary, but such as his father would have been bound to provide for him, and for these his father is liable in an action. Brown on Sales, § 250, p. 171.

² Bacon, Abr. Infancy, (I) 1; *Story v. Perry*, 4 Carr. & Payne, 526; *Cook v. Deaton*, 3 Carr. & Payne, 114; *Burghart v. Angerstein*, 6 Carr. & Payne 699; *Brooks v. Crowse*, Andr. R. 277; *Clowes v. Brooke*, 2 Strange, R. 1101; *Barber v. Vincent*, 1 Freeman, R. 531.

³ *Hands v. Slaney*, 8 T. R. 578; *Harrison v. Fane*, 1 Scott, N. R. 287; *Peters v. Fleming*, 6 Mees. & Welsb. 42. But see *Rainwater v. Durham*, 2 McCord, R. 524.

the horse was a "necessary," for which he was liable.¹ But Vaughan, C. J., entertained the extraordinary opinion, that "balls and serenades at night must not be accounted necessities" even for a nobleman.² The Court also considered in another case, that "velvet and satin suits laced with gold," were not to be deemed necessary, even for a gentleman of the chamber to the Earl of Essex.

§ 35. The question, whether particular articles are necessities, depends upon the actual and not the apparent fortune of the infant. The question, whether articles supplied to an infant come within the class of technical "necessaries," so as to enable the tradesman supplying them to recover therefor, if there be no special defence, is a question of law for the determination of the Court.³ But where there is a special defence, — as that the infant had an ample allowance; or, that the tradesman had notice not to trust him; or, that the infant was already supplied; or, that they were not really necessary or suitable, under the special circumstances of the case; or, that exclusive credit was given to the infant; — the question is one of fact for a jury to determine.⁴ The Court, therefore, may decide that the articles are technically "necessaries," but if there be any question, whether they be actually necessary and suitable, or, whether the tradesman ought, under the circumstances, to recover, it is to be determined by the jury. That is, the Court can say, that certain classes of things are or are not included in the class of technical necessities; but as to things, in regard to which there is a doubt, whether they are or

¹ Hart v. Prater, 1 Jur. R. 623.

² Rainsford v. Fenwick, Carter, R. 216.

³ Makarell v. Bachelor, Cro. Eliz. 583. See also Stone v. Withipool, Latch, R. 21.

⁴ Buler v. Young, 1 Bibb, R. 519; Stanton v. Wilson, 3 Day, R. 37; Maddox v. Miller, 1 Maule & Selw. 738; Bacon, Abr. Infancy & Age, (I) 1.

are not rendered necessary and suitable by the circumstances of the case, the question is one for a jury. Thus, in an action for goods or apparel supplied to the infant, the Court may at once decide, that such articles are "necessaries;" but if the defence be, that they were of an extravagant kind, or furnished upon the exclusive credit of the infant, the jury can alone decide the question.

§ 36. Where articles are sold to an infant, the vendor is bound to ascertain, not only whether they are necessities in kind, but whether the infant is already supplied; for unless they be suitable both in quality and quantity, he cannot recover their price;¹ and, therefore, if he bring a suit for a suit of clothes, he will be nonsuited, unless he prove, that it is suitable. Thus, where a tailor supplied an infant with clothes to an extravagant extent, it was held that he could not maintain an action against the father for any portion of his demand.² Nor does it make any difference, that the appearance of the infant justified the supposition, that the articles supplied by the tradesman were necessities, since it is the actual rank and fortune of the infant, and not his apparent condition, by which the question, whether they are necessities or not is to be determined.³ All such contracts with infants are made at the risk of the seller; and he is bound in a suit thereupon to prove affirmatively, that the articles were necessities, both in kind and in amount.⁴ In-

¹ *Burghart v. Angerstein*, 6 Carr. & Payne, 660; *Charters v. Bayntun*, 7 Carr. & Payne, 52, 55; *Bainbridge v. Pickering*, 2 Black. R. 1325; *Ford v. Fothergill*, Peake, R. 229; S. C. 1 Esp. R. 211; *Mortara v. Hall*, 6 Simons, R. 465; *Guthrie v. Murphy*, 4 Watts, R. 80; *Kline v. L'Amoureux*, 2 Paige, R. 419.

² *Simpson v. Robertson*, 1 Esp. R. 17.

³ *Ford v. Fothergill*, 1 Esp. R. 211; S. C. Peake, R. 229; *Story v. Perry*, 4 Carr. & Payne, 526; *Cook v. Deaton*, 3 Carr. & Payne, 114; *Burghart v. Angerstein*, 6 Carr. & Payne, 699; *Ive v. Chester*, Cro. Jac. 560; S. C. Palm. R. 361.

⁴ *Harrison v. Fane*, 1 Scott, N. R. 287; *Glover v. Ott*, 1 McCord, R.

deed, if an infant be under the care and protection of his parent or guardian, he would not ordinarily be liable for necessities, upon the ground, that, otherwise, the father or guardian would be deprived of the power of regulating his expenses and his mode of life.¹ The seller would, therefore, under such circumstances, be bound to show that the articles were supplied with the assent, or under the implied authority, of the father or guardian.² Yet such an assent or authority is not required to be express, provided it be manifestly indicated by the circumstances, under which the articles were supplied. Thus, if, under ordinary circumstances, the infant purchase clothes, and wear them in the presence and with the knowledge of his father, or, if articles be delivered at the father's house for the infant, and no objection be made by the father, his assent would be implied *primâ facie* ;³ even in such a case, however, the presumption might be rebutted.⁴ But no such contract will be implied when the father has allowed to the son a reasonably sufficient sum for his expenses,⁵ although the tradesman be ignorant of the allowance ; on the ground, that the mere fact of knowledge on the part of the father, that the goods were in the possession of the infant, would afford no indication of his knowledge that they had not been purchased with the allowance, and, therefore, that his assent or agreement to be personally responsible beyond the allowance, could not be implied therefrom.

572 ; *Ford v. Fothergill*, 1 Esp. R. 211 ; *S. C. Peake*, R. 229. See also *Ive v. Chester*, Cro. Jac. 560.

¹ *Borrinsale v. Greville*, 1 Selw. N. P. 128 ; *Deale v. Leave*, Ib. ; *Angel v. McLellan*, 16 Mass. R. 31 ; *Wailing v. Toll*, 9 Johns. R. 141 ; *Kline v. L'Amoureux*, 2 Paige, R. 419 ; *Bainbridge v. Pickering*, 2 W. Black. R. 1325 ; *Hall v. Conolly*, 3 McCord, R. 6.

² *Rolfe v. Abbott*, 6 Carr. & Payne, 287. See preceding notes. *Blackburn v. Mackey*, 1 Carr. & Payne, 1 ; *Flack v. Tollamache*, 1 Carr. & Payne, 5.

³ *Baker v. Keen*, 2 Stark. R. 501 ; *Van Valkenburgh v. Watson*, 13 Johns. R. 480 ; *Mortimer v. Wright*, 6 Mees. & Welsb. 482.

⁴ *Rolfe v. Abbott*, 6 Carr. & Payne, 288.

⁵ *Crantz v. Gill*, 2 Esp. R. 471.

§ 37. An infant is bound to pay a reasonable price for such necessary things as appertain to his maintenance and education, such as food, lodging, apparel, medical attendance, and schooling, — unless it appear that exclusive credit was given to the parent or guardian ; and such is always presumed to be the fact, if it appear that he was placed at school or supported by such parent or guardian.¹ But he is not liable for money borrowed by him for the purpose of procuring necessities, though it be absolutely applied to such a purpose ; and the reason for this rule is stated to be, that the contract arises on the lending, and is not, therefore, within the rule, since the money may be otherwise expended, than for necessities.² But why may not money be an actual necessary ? Or what reason is there for not considering the infant in the light of a trustee or agent for the person lending, in cases where the money is lent for the express purpose of enabling the minor to procure necessities, and is actually so applied ? The person making a loan under such circumstances would undoubtedly be entitled to relief in Equity.³ If, then, the lender would acquire a legal claim upon the infant, he himself should expend the money in necessities, and then furnish the necessities to the infant.⁴

§ 38. An infant is not liable for the purchase of wares, bought for the purpose of carrying on a trade by which he earns his livelihood, because such articles do not come within

¹ Bacon, Abr. Infancy (I) 1 ; *Crantz v. Gill*, 2 Esp. R. 472 ; *Dunscombe v. Tickridge*, Aleyn, R. 94 ; *Angel v. McLellan*, 16 Mass. R. 31 ; *Wailing v. Toll*, 9 Johns. R. 141 ; *Baker v. Lovett*, 6 Mass. R. 78 ; *Stone v. Dennison*, 13 Pick. R. 1.

² Bacon, Abr. Infancy (I) 1 ; *Earle v. Peale*, 1 Salk. R. 386 ; *Darby v. Boucher*, 1 Salk. R. 279 ; *Probart v. Knouth*, 2 Esp. R. 972, n. 1 ; *Comyn on Contracts*, 161 ; *Story on Contracts*, § 59.

³ 2 Evans, *Pothier on Obligations*, 26 ; *Marlow v. Pitfield*, 1 P. Will. R. 558 ; *Reeve's Domestic Relations*, 330.

⁴ Bacon, Abr. Infancy (I) 1.

the class of necessities.¹ So, also, an action is not maintainable against him for work done, and labor and services performed for him in the course of any trade, in which he may be engaged on his own account, and whereby he gains his living.² But although commodities be purchased by him for the purposes of trade, yet if they be actually consumed as necessities, he will be liable therefor.³

§ 39. An infant cannot bind himself to pay a *certain* and *definite* sum even for necessities; since he would thereby preclude himself from restricting his liability to the actual worth of the articles, which he may buy.⁴ He is not absolutely liable, therefore, on a Bill of Exchange, accepted; ⁵ nor on an account stated; ⁶ nor on a Promissory Note.⁷ These instruments when signed by an infant are, however, now held not to be void, but only voidable.⁸

§ 40. *Married Women.*—Upon the marriage of a woman, the law, from motives of policy, divests her of all her personal property, and rights of property, not secured to her separate use and behoof by deeds of trust, and places them at the dispo-

¹ *Turberville v. Whitehouse*, 1 Car. & Payne, 94; *Earle v. Peale*, 1 Salk. R. 386; *Darby v. Boucher*, 1 Salk. R. 279; *Whittingham v. Hill*, 1 Roll. Abr. 729.

² *Dilk v. Keighley*, 2 Esp. R. 480.

³ See previous note.

⁴ *Bacon*, Abr. Infancy (I) 1; 2 Kent, Comm. Lect. 31, p. 235.

⁵ *Williams v. Watts*, 1 Camp. R. 552.

⁶ *Wood v. Witherick*, Noy, R. 87; *S. C. Latch*, R. 169; *Trueman v. Hurst*, 1 T. R. 40; *Bartlett v. Emery*, 1 T. R. 42, note (a); *Ingledeu v. Douglass*, 2 Stark. R. 36; but see *Williams v. Moor*, 11 Mees. & Welsb. 256, where an infant is held to be responsible on an account stated.

⁷ 2 Kent, Comm. Lect. 31, p. 235; *Goodsell v. Myers*, 3 Wend. R. 479; *Fisher v. Jewett*, Berton, R. 35; *Lawson v. Lovejoy*, 8 Greenl. R. 405; *Dubose v. Wheddon*, 4 McCord, R. 221; *Whitney v. Dutch*, 14 Mass. R. 462; *Reed v. Balchelder*, 1 Metcalf, R. 559.

⁸ *Ibid.*

sal of her husband. But while the husband thus assumes the personalty of his wife, so that he may sue upon her *choses in action*, and avail himself of the profits of her industry, he is also burdened with her past and future debts. There is one limitation to his authority, which obtains in respect to all *choses in action* not reduced to possession by the husband during his lifetime, in which case they become, on his death, the sole property of the wife.¹

§ 41. It is greatly to be desired that the whole law relating to the powers and responsibilities of married women should be revised. The servile rules of a feudal age relating thereto, have survived the customs, institutions, and opinions from which they sprung, and are in utter discord with the freer and more expanded socialism of the present age. Many of the restrictions upon the powers and privileges of married women are but the relics of that early English barbarism, which made woman the slave and degraded handmaid, in the home where she should be the equal and friend; which revered brute force and despised the grace of gentleness; and which had a nearer affinity to the animal than to the angel. The condition of woman in any age affords the best type of its true civilization. Uniformly, in the same ratio as education, commerce, and peace have enlarged the views, liberalized the temper and humanized the spirit of the age, has the condition of woman improved; and we shall hail it as a symbol of a progressive civilization, whenever the legal fetters in which the powers of woman are now cramped, are stricken away, and she stands on a platform of equal rights with man. At the same time, however, that her disabilities are removed, it is but fit and proper, that her responsibilities should be enlarged; for it is difficult to say whether her disabilities operate more to her own injury, by

¹ Bac. Abr. Baron & Feme, C. 3; *Gaters v. Madeley*, 6 Mees. & Welsb. R. 423.

depriving her of powers and rights, or whether her privileges operate more to the injury of those who contract with her, by narrowing so closely her responsibilities. Her privileges and responsibilities are but the two edges of a sword, which injures more often than it aids, and from which, with all the rest of her feudal armor, she should be relieved.

§ 42. The first step in any reform on this matter, would be to enable a married woman to hold property independently of her husband, and to give him no rights or powers over property bequeathed or given to his wife or purchased by her, by virtue merely of his being her husband. The objection, so often raised against this policy, that the existence of distinct rights of property would disturb the harmony of domestic life, and occasion an opposition of interests fatal to the internal peace of families, seems to be merely specious. For, in the first place, such separate rights and powers can always be obtained by means of the awkward intervention of trustees; and in cases where resort has been had to trustees, no such injurious consequences as those predicted have followed, unless the money of the wife was the object of the marriage; and, also, in the second place, wherever there is true harmony of feeling, the mere fact, that the wife has separate funds, will never occasion domestic quarrels or ill feeling; and, in the third place, if there be no true harmony of feeling, there never will be any unity of interest, and in these cases, the power of the husband over the property of his wife affords opportunities to him for exercising tyranny and injustice. Again, in case of bankruptcy, where no credit has been given to the wife, and where she has been in no fault, she and her children may, by the operation of the present law, be rendered the victim of her husband's misfortunes. The argument, that any woman can, if she please, place her property in the hands of trustees and thereby prevent her husband from exercising control over it, does not apply to cases where the property is not put in trust, and such are by far the most numerous. Ordinarily, women will not, from motives of confidence and affec-

tion, or from carelessness, wilfulness, or ignorance, place their property in trust before marriage, and after marriage it is at the option of the husband to allow or to forbid such a proceeding. Besides, although the property be put in trust, the husband may legally appropriate the income, as soon as it comes to the possession of his wife, and thus virtually annul the objects of the trust. The true policy would be, as it seems to us, to enable the wife to hold property independently of the husband, in like manner as if she were an unmarried woman.

§ 43. The moment that a married woman shall be invested with rights of property independent of her husband, all the reasons for her disabilities will fail, and the whole fiction of the law, upon which they are founded, will be without support. Then, there will be no plausible reason why she should not contract, and render herself liable on her engagements, and assume the same personal privileges as if she had not been married. But such is not the rule of the Common Law, and we pass, therefore, to the consideration of her rights and responsibilities as they now exist.

§ 44. The general rule is, that a married woman cannot, during her coverture, make a contract by which she is personally bound.¹ Upon all contracts, which she makes, therefore, her husband becomes liable, if the circumstances of the case create a presumption of his assent thereto.²

§ 45. To this rule there are, however, several exceptions, which obtain in respect to certain situations, in which it becomes

¹ Perk. § 154; Earl of Derby's case, 2 Leon. R. 42. The same rule obtains in the Scottish Law, and is stated by Erskine, l. 6, 25, and Stair, l. 4, 16; Brown on Sales, § 232, p. 162; Ross on Vendors, Ch. II., Sect. 1, p. 93.

² Montague v. Espinasse, 1 Car. & Payne, 357; Montague v. Benedict, 3 Barn. & Cres. 635; Waithman v. Wakefield, 1 Camp. R. 120; Post, § 52.

necessary that she should have the power of assuming a personal liability on her contracts, in order to secure to herself the means of subsistence or of enjoyment.

§ 46. The first of these exceptions occurs, when the husband is *civiliter mortuus*, and is, therefore, incompetent to make a contract; as, for instance, if he be banished; or, if he enter a monastic institution; or, if he be transported for life.¹ Imprisonment of the husband for life is not, by the Common Law, such an extinguishment of civil life, as to give to the wife a freedom to contract as a *feme sole*. But in some of the States in the United States, the wife is enabled, by statute, to demand a divorce *a vinculo matrimonii*, if the husband be sentenced to imprisonment in the state prison for the term of life, or for seven years or more; and his pardon will not revive his conjugal rights in case of a divorce for such cause.²

§ 47. Another exception obtains in cases where the husband is an alien or foreigner, and has never resided in the country, in which case the rights of the wife to contract are the same as if she were a *feme sole*. If, however, he have once resided within the country, this exception does not apply, for the presumption is, that he will return.³ But this distinction, which has obtained in America as well as in England, seems to be founded in no sure principle of equity or justice, and may oftentimes be productive of great injury and misery. If a husband, not being an alien, absolutely desert a wife, and she be forced to depend upon herself for her subsistence, is it not, in such a case at least, as necessary, in order to enable her to pro-

¹ *Spooner v. Brewster*, 2 Car. & Payne, 35; *Boggett v. Frier*, 11 East, R. 304, note, (Day's ed.); Story on Contr. § 63.

² Mass. Rev. Stat. ch. 76, § 5.

³ *Gregory v. Paul*, 15 Mass. R. 31; *Abbot v. Bayley*, 6 Pick. R. 89; *Kay v. Duchess of Pienne*, 3 Camp. R. 123, by Lord Ellenborough, and confirmed by the whole Court of King's Bench.

cure the needs and enjoy the pleasures of life, that she should be able freely to contract, as if her husband lived in the next State, and furnished her with means of support?¹ And yet, as we have seen, she may in the latter case contract as a *feme sole*.

§ 48. The next exception is, when the husband has been absent and unheard from for the period of seven years, in which case the legal presumption arises that he is dead. If, however, such a presumption be disproved in fact, the exception fails.²

§ 49. Another exception is by the custom of London, which allows a *feme covert*, if the husband assent thereto, to carry on a trade, separate from him, and to assume a personal responsibility upon her contracts; and, indeed, to acquire all the rights of a *feme sole* in respect thereto. Her husband must, however, be made a nominal party in all suits brought by and against her, though the judgment does not affect him.³ The same custom, also, prevails in some of the States of the United States; as in Pennsylvania, and South Carolina.⁴

§ 50. Another exception obtains in cases where the husband deserts the wife, and leaves the country without making

¹ 2 Kent, Comm. Lect. 38, p. 157. In *Bean v. Morgan*, 4 McCord, R. 148, the better doctrine was held, that if the husband depart from the State with no intention of returning, his wife becomes competent to contract as a *feme sole*. See also *Gregory v. Pierce*, 4 Metcalf, R. 478.

² *Robinson v. Reynolds*, 1 Aik. R. 174.

³ Bac. Abr. Baron & Feme, (M); *Beard v. Webb*, 2 Bos. & Pul. R. 93; *Caudell v. Shaw*, 4 T. R. 361.

⁴ *Burke v. Winkle*, 2 Serg. & Rawle, 189; *Newbiggin v. Pillans*, 2 Bay, R. 162; *State v. Collins*, 1 McCord, R. 355; *McDowall v. Wood*, 2 Nott & McCord, R. 212; *City Council v. Van Roven*, 2 McCord, R. 465; *Megrath v. Robertson*, 1 Dess. R. 445.

provision for her support, and without the intention of returning.¹

§ 51. The last exception applies when the husband and wife are divorced *a mensa et thoro*; in which case, the disability of the wife is partially removed, and she is enabled to sue her husband for her alimony, and to bring suit in the ecclesiastical courts for personal injury.² In all other cases, the general rule of the Common Law obtains, by which she can neither sue nor be sued, although she be divorced *a mensa et thoro* from her husband, and receive an ample sum for her separate maintenance.³ This general rule does not, however, obtain universally in this country, and, in some of the States, statute has greatly enlarged the powers and privileges of a married woman in respect of her contracts, and in a measure stricken off the slavish shackles of the feudal law.⁴

§ 52. We have thus seen, that a married woman is, with very few exceptions, disabled from making a contract, which shall be personally binding upon her. It becomes necessary,

¹ Abbot v. Bayley, 6 Pick. R. 93; 2 Story, Eq. Jurisp. § 1387; Story on Partnership, § 11, p. 15; 2 Roper on Husband & Wife, ch. 18, § 4, p. 174, 175; Cecil v. Juxon, 1 Atk. R. 278; Lamphier v. Creed, 8 Ves. R. 599; Com. Dig. Chancery, 2 M. 11. By the Revised Statutes of Massachusetts, this rule has been extended to all cases where a married woman comes into the State from any other State, or country, without her husband, he never having lived with her in Massachusetts. Rev. Stat. ch. 77, § 18, p. 487; Gregory v. Paul, 15 Mass. R. 34. See, also, De Gaillon v. L'Aigle, 1 Bos. & Pul. R. 357; Walford v. Duchess of Pienne, 2 Esp. R. 551.

² Motteram v. Motteram, Part 3, Bulst. R. 264; Chamberlain v. Hewitson, 1 Ld. Raymond, R. 73; S. C. 5 Mod. R. 71; 2 Dane's Abr. 307.

³ Hatchett v. Baddeley, 2 Black. R. 1082; Lean v. Shutz, 2 Black. R. 1195; Hyde v. Price, 3 Ves. R. 443; Marshall v. Rutton, 8 T. R. 546. The rule was finally settled in England by the last case, and is supported by all the subsequent decisions. Lewis v. Lee, 3 Barn. & Cres. 291.

⁴ Dean v. Richmond, 5 Pick. R. 467; Abbot v. Bayley, 6 Pick. R. 89; 2 Kent, Comm. Lect. 28, p. 157.

therefore, to consider the cases in which the husband becomes liable upon contracts made by his wife, since it is upon him alone, that the law imposes a personal liability in respect thereto.

§ 53. The general rule is, that the husband is only liable upon those contracts of his wife, which he has either expressly or impliedly authorized, or assented to.¹ Ordinarily, therefore, it is not for the husband to prove, in an action against him for the price of goods sold to his wife, that he has given notice to the tradesman not to supply her; but it is incumbent on the tradesman to prove, that the wife was acting under the authority of the husband.²

§ 54. The reason of this rule is apparent in cases where the wife is possessed of no property in her own right, since, as her husband is liable for her contracts, his assent thereto is an essential prerequisite to his liability. But it is difficult to perceive the reason why a married woman, who has secured to her in her own right an ample fortune, should, nevertheless, be wholly unable to offer a legal consideration to support her contract. If she be able to hold property and to disburse money at her pleasure, why should she be so encumbered in her legal rights, so as to prevent her from availing herself thereof as a consideration for her promise, and from pledging therefor her personal responsibility? Under the rule, as it now stands, a husband has it in his power, by giving notice to tradesmen not to trust his wife, to exercise an irritating tyranny, and to shut her out from pleasures, which are suitable to her condition and justified by her fortune.

¹ *Montague v. Espinasse*, 1 Car. & Payne, 357; *Montague v. Benedict*, 3 Barn. & Cres. 635; *Atkins v. Curwood*, 7 Car. & Payne, 760; *Seaton v. Benedict*, 5 Bing. R. 30; *Norton v. Emmett*, 8 Car. & Payne, 510; *Spreadbury v. Chapman*, 8 Car. & Payne, 371; *Mizen v. Pick*, 3 Mees. & Wels. 481.

² *Ibid.*

§ 55. In cases where an express authority or consent is given, little dispute can occur, and the question is one for the jury alone. The greater number of questions arises in cases, where the authorization or consent is to be implied from acts and circumstances, — and in respect to these, several presumptions of law are created. An absolute presumption of the consent of the husband arises when the husband and wife live together, and the goods supplied by order of the wife are necessities;¹ for he is legally bound to supply her with necessities, provided they be such, both in quantity and quality; and if he refuse so to do, the law makes her his agent to procure them. If, therefore, the husband should expressly prohibit all persons from supplying her with necessities, he would nevertheless be bound to pay for them.² This privilege of a *feme covert* is, however, restricted to direct contracts for necessities. And if she should borrow money for the purpose of procuring necessities, the husband would not, at law, be liable therefor, even though it were actually so applied.³ Yet if the money be expended in necessities, and the circumstances be such, that they would have rendered the husband responsible for the necessities purchased therewith, the lender would be entitled to recover from him in equity.⁴

§ 56. The next strongest presumption of the consent of the husband to the contract of the wife arises from their cohabitation, in cases where the goods supplied are not included in the class of necessities. This is, however, merely a presumption, and may be shown to be incorrect.⁵ It is, nevertheless, so

¹ Ibid.

² Ibid.

³ *Stone v. Macnair*, 1 Moor, R. 126; *Marlow v. Pitfield*, 1 P. Will. R. 558.

⁴ *Earle v. Peale*, 1 Salk. R. 387; *Harris v. Lee*, 1 P. Will. R. 482; *Marlow v. Pitfield*, 1 P. Will. R. 558.

⁵ *Montague v. Benedict*, 3 Barn. & Cres. 635; *Etherington v. Parrott*, 2 Lord Raym. 1006; S. C. 1 Salk. R. 118.

strong, that if a man cohabit with a woman, holding her out to be his wife, when she, in fact, is not his wife, he will be liable for goods furnished to her, in like manner as if she were actually his wife; although the tradesman knew, that they were not married.¹ Yet if he knew that their intercourse is adulterous, the ostensible husband will not be liable.² All articles, which are not necessities, are supplied to a married woman at the risk of the seller, and he is bound to assure himself, either, that she is actually authorized to purchase them, or that they are necessities, both in quantity and quality.³ Nor, in such a case, does it make any difference that the tradesman is deceived by the false appearance assumed by her, if by cautious inquiries he might have ascertained her real condition and authority; the husband would not be liable for goods which were not "necessaries," although the tradesman furnishing them was betrayed by her appearance and conduct into a belief that they were suitable to her rank and condition.⁴ So, also, although they may be necessities in quantity and quality, yet if she be already sufficiently supplied with them, the vendor cannot recover their price.⁵ So, if a tradesman sell articles, which are not necessities, to a married woman, relying solely on her credit or personal promise; ⁶ or if the husband do not authorize her to make such a purchase; or even if he be ignorant of the fact of the

¹ *Robinson v. Nahon*, 1 Camp. R. 216; *Watson v. Threlkeld*, 2 Esp. N. P. C. 637; *Munroe v. De Chemant*, 4 Camp. R. 215; *Blades v. Tree*, 9 Barn. & Cres. R. 167; *Etherington v. Parrott*, 1 Salk. 118, and Evans's note.

² *Norton v. Fazan*, 1 Bos. & Pul. 226.

³ *Montague v. Benedict*, 3 Barn. & Cres. 366; *Atkins v. Curwood*, 7 Car. & Payne, 760; *Waithman v. Wakefield*, 1 Camp. R. 120; *Montague v. Espinasse*, 1 Car. & Payne, 357.

⁴ *Waithman v. Wakefield*, 1 Camp. R. 120; *Atkins v. Curwood*, 7 Car. & Payne, 756.

⁵ *Ibid.*

⁶ *Bentley v. Griffin*, 5 Taunt. R. 356.

sale, and his consent cannot be implied from the circumstances, he will not be liable.¹

§ 57. If, on the contrary, the wife has been previously in the habit of purchasing similar articles from the same tradesman, whether they be necessities or not, and the price thereof has been paid by the husband, without objection, it will be considered as sufficient evidence of an implied authority from the husband to the wife to purchase as his agent. In such a case, it becomes the duty of the husband to give notice to the tradesman, that his wife has no authority from him to buy. Such a notice, however, will not remit to the husband his liability, unless it actually come to the knowledge of the vendor, or be given to his agent, or some person authorized by him to receive it, — which fact it is incumbent on the husband to show.² But where the wife deals with the vendor for the first time, or purchases articles of luxury, or which are not necessities, he furnishes them at his peril. Of course, the husband would, for a stronger reason, be absolved from liability to the vendor, if he should furnish goods under circumstances which indicated a want of authority on the part of the wife ; as if he should supply the wife with them clandestinely.³ Whether the circumstances of any particular case indicate an implied assent on the part of the husband to the contract of his wife, is a question of fact for the determination of the jury.⁴ In all cases where his assent is implied from the circumstances, he would be liable whether the goods were necessities or not, unless credit be given solely to the wife ; in which case he would not be liable, although the wife live with him, and he see her in possession

¹ *Metcalf v. Shaw*, 3 Camp. R. 22 ; *Etherington v. Parrott*, 1 Salk. R. 118 ; *Montague v. Baron*, 5 Dowl. & Ry. 532.

² *Rawlins v. Vandyke*, 3 Esp. R. 250.

³ *Montague v. Baron*, 5 Dowl. & Ry. 532 ; *S. C. Montague v. Benedict*, 3 Barn. & Cres. 631 ; *Montague v. Espinasse*, 1 Car. & Payne, 356.

⁴ *Bentley v. Griffin*, 5 Taunt. R. 356.

of the goods.¹ So, also, if the wife live apart from her husband, and improvidently purchase goods, for which he would not otherwise be liable, his assent will be implied, if, having any control over them, he do not cause them to be returned to the vendor.²

§ 58. In cases of fraudulent misrepresentation on the part of the wife of her authority to bind her husband, upon principle, she would be liable in *trover* for the goods, if they were in her possession, or for their value, if she had parted with them upon a valuable consideration, which she retained.³ If, however, they had been consumed by her, or she had given them away, or had parted with the proceeds of a sale thereof, the seller would be remediless; upon the ground, that to render her responsible, in such cases, would be to impose the real liability upon the husband, who, not having authorized her purchase, could not be legally bound thereby. Besides, another and stronger reason is to be found in the policy, which throws upon the vendor the risk, in cases, where he knowingly sells to a married woman, and which renders it his duty to guard against her deceit, by not implicitly trusting to her representations. If, however, she still retain the goods purchased, or their proceeds, she would, upon principle, be liable therefor in *trover*; upon the ground that her fraud, which is a *tort*, annuls the contract, and leaves her in the situation of a person having goods, for which she has paid no consideration, and which do not belong

¹ Ibid.

² *Waithman v. Wakefield*, 1 Camp. R. 120.

³ *Deerly v. The Dutchess of Mazarine*, 2 Salk. R. 646; *Waithman v. Wakefield*, 1 Camp. R. 120; see Ante, note 2, § 28. The same rule would seem to apply to married women as to infants, in this respect. *Partridge v. Clarke*, 5 T. R. 194; *Waters v. Smith*, 6 T. R. 451; *Pitt v. Thompson*, 1 East. R. 16; *Wilkins v. Wetherell*, 3 Bos. & Pull. 220; *Pearson v. Meadow*, 2 Black. R. 903; *Luden v. Justice*, 1 Bing. R. 344; S. C. 8 Moore, R. 346.

to her. She could not, of course, be liable in an action of *assumpsit*, since the form of the action would virtually, and, at least, for the purposes of the trial, affirm the contract, and she could only be rendered personally responsible upon the ground that there was no contract in existence, because of the fraud, but only a *tort*. If the action proceed upon the ground of the existence of a contract, the defence, that she is not liable personally on her contracts would be unanswerable. But if the action affirm a tortious possession of the goods, such a defence would not present an issue in the pleadings.

§ 59. A vendor could not, however, retake from a married woman goods obtained from him, without a false representation, even although she should still retain them in her possession; because as her possession was acquired by contract, she could not be made responsible thereon, and there being no *tort*, *trover* could not be sustained. Besides, it would not, in such a case, be by any means evident, that the seller did not trust to the personal credit of the woman, which he might fairly do; for, although he could not maintain an action against her, personally, for the purchase-money, yet the consideration, on her part, would be good, and sufficient to support the contract, though it would not be valuable.

§ 60. If credit be exclusively given to a married woman, the husband is not liable, although the wife live with him, and although he see her in possession of the goods bought.¹ If, therefore, the tradesman take her promissory note in payment, the husband would not be liable for the price of the goods for which it was given, and need not prove, that the goods were

¹ Bentley v. Griffin, 5 Taunt. R. 356; Taylor v. Brittan, 1 Car. & Payne, 14, u.; Dixon v. Hurrell, 8 Car. & Payne, 817.

unnecessary.¹ It is, however, generally, a question of fact for a jury to determine, whether credit were given to the wife.²

§ 61. Such being the limits set by the law to the responsibility of the husband on the contracts of his wife, while they live together, it remains for us to consider the bounds and extent of his responsibility thereon, after separation from her by force, accident, agreement, or law.

§ 62. Where the cause of the separation is the adultery of the wife, in whatever manner such separation may be effected, whether by a decree of divorce, or a voluntary elopement of the wife, or her forcible expulsion by the husband, he will not be responsible even for necessities furnished to her.³ The law does not stop here, but in consideration for the feelings of the husband, and of the abhorrent nature of the crime, it not only utterly relieves him of the burden of supporting her, but also shuts her out from her right of dower in his estate.⁴

§ 63. But if the husband permit the wife to remain in his house, after she has been guilty of adultery, he is liable for contracts for necessities, although he leave the house himself, if the circumstances, under which he leaves her, do not clearly indicate to the public, an intention not to be responsible therefor. Thus, where a husband, on account of the adultery of his wife, left her with his two children in his house, without mak-

¹ *Metcalf v. Shaw*, 3 Camp. R. 22.

² *Bentley v. Griffin*, 5 Taunt. R. 356; *Taylor v. Brittan*, 1 Car. & Payne, 14, n.; *Dickson v. Hurrell*, 8 Car. & Payne, 817; *Metcalf v. Shaw*, 3 Camp. R. 22; *Harvey v. Norton*, 4 Jur. R. 42.

³ *Hetherington v. Graham*, 6 Bing. R. 135; *Hunt v. De Blaquiére*, 5 Bing. R. 562; *Haidee v. Grant*, 8 Car. & Payne, 512; *Emmett v. Norton*, 8 Car. & Payne, 506; *Govier v. Hancock*, 6 T. R. 603; *Norton v. Fazan*, 1 Bos. & Pul. 226; *Ozard v. Darnford*, Selw. N. P. 221; *Bird v. Jones*, 3 Mood. & Ry. 121; *Ham v. Toovey*, 1 Selw. N. P. 278.

⁴ *Ibid.*

ing any provision for her in consequence of the separation, and she continued to live in a state of adultery, it was held, that the husband was liable to the tradesman for the price of necessaries supplied to her, unless the tradesman knew, or ought to have known, the circumstances under which she was living.¹

§ 64. So, also, the voluntary elopement of the wife without sufficient cause, although it be not with an adulterer, or in an adulterous manner, absolves the husband of all liability upon her account.² And both in this class of cases, and in those where the wife has been separated from her husband for adultery, the husband is not required to notify to the tradesman her want of authority to bind him, or to caution him against trusting her, since the general rule, that all persons contract with a married woman at their own peril, applies in such a case with double force.³ It is only, however, in cases where she voluntarily leaves him, without sufficient cause, that this rule applies;⁴ for if he expel her from his house, without sufficient cause;⁵ or, if she leave him on account of ill-treat-

¹ *Norton v. Fazan*, 1 Bos. & Pul. 226.

² *Harwood v. Heffer*, 3 Taunt. R. 421; *Corbett v. Poelnitz*, 1 T. R. 5; *Child v. Hardyman*, Strange, R. 875; *Hendley v. The Marquis of Westmeath*, 6 Barn. & Cres. 200; *Mainwaring v. Leslie*, 2 Car. & Payne, 507.

³ *Todd v. Stokes*, 1 Ld. Raym. R. 444, 445; *Hinton v. Hudson*, Freem. R. 248.

⁴ *Harwood v. Heffer*, 3 Taunt. R. 421; *Corbett v. Poelnitz*, 1 T. R. 5. See *Houliston v. Smyth*, 3 Bing. R. 127, wherein the decision in *Harwood v. Heffer* is strongly reprobated. It is only, however, in respect to the application of the rule, that the case is there treated as unjustifiable, while the rule itself is not impugned. In *Harwood v. Heffer*, the fact that the husband kept a courtesan under his roof, was not considered as *sufficient cause* to justify her in leaving him. In *Houliston v. Smyth*, it was held to be an amply sufficient cause. The difference was in respect to the sufficiency of the facts to justify her abandonment.

⁵ *Thompson v. Hervey*, 4 Burr. R. 2177; *Montague v. Benedict*, 3 Barn. & Cres. 635; *Hodges v. Hodges*, 1 Esp. R. 441.

ment, or other adequate reason, he will be liable in like manner as if they still lived together.¹ If she leave the house under circumstances which indicate on her part a reasonable apprehension of violence, the husband is not thereby absolved from the necessity of supporting her.² So, also, if her husband live adulterously with another woman, keeping her under his roof, she is justified in leaving the house, and he is bound to supply her with necessaries.³ But in an action against the husband for necessaries furnished to the wife while living separate from him, the plaintiff must show affirmatively that the separation took place in consequence of his misconduct.⁴

§ 65. A distinction obtains between the cases where the wife elopes with an adulterer, and where she elopes, but not with an adulterer. In the latter case he is bound to receive her again, upon her solicitation or offer to return; and if he refuse, he is, nevertheless, liable from such time for necessaries furnished to her.⁵ But in the former case, he is never bound to receive her, and her offer to return imposes no liability on him.⁶ Yet if he actually receive her again, after he have turned her away for adultery, and treat her again as his wife, he revives his responsibility; and if he again expel her from his house, he does not absolve himself from liability for necessaries furnished to her.⁷

¹ *Houlston v. Smyth*, 3 Bing. R. 127; *Reed v. Moore*, 5 Car. & Payne, 200; *Emery v. Emery*, 1 Younge & Jerv. 501.

² *Houlston v. Smyth*, 3 Bing. R. 127; *Emery v. Emery*, 1 Younge & Jerv. 501; S. C. 6 Price, R. 336.

³ *Aldis v. Chapman*, 1 Selw. N. P. 281.

⁴ *Blower v. Sturtevant*, 4 Denio, R. 46.

⁵ *Ewers v. Hutton*, 3 Esp. 256; *Child v. Hardyman*, 2 Strange, R. 875; and the cases collected in 2 Strange, R. 1214, n. 1; 1 Bacon, Abr. Baron & Feme, (II.); *M'Cutchen v. M'Gahay*, 11 Johns. R. 281; *M'Gahay v. Williams*, 12 Johns. R. 293.

⁶ *Govier v. Hancock*, 6 T. R. 603.

⁷ *Harris v. Morris*, 4 Esp. 41; *Bolton v. Prentice*, 1 Selw. N. P. 249; S. C. 2 Strange, R. 1214.

§ 66. When the husband and wife do not live together, and the separation has been occasioned by her adultery, or when, after a separation for other reasons, she lives in open adultery, the husband is not liable even for necessaries. But where the separation has not been on account of adultery, and the wife is not an adulteress, the law makes her his agent to order such things as are reasonable and necessary.¹ If the separation be by a divorce *a mensa et thoro*, with a decree for alimony, he is liable for necessaries supplied to her, if he omit to pay the alimony, and not otherwise.² So, also, where the separation is by mutual consent, if the husband allow the wife an allowance adequate for her maintenance, he is not liable to be sued for her debts, although the separation be not by deed, and although there be no written agreement between them in respect to the allowance.³ Nor is it necessary that notice of the allowance should be given by him to the tradesman, in order to absolve him from liability.⁴ The adequacy of the allowance is a question of fact, to be determined by the jury, in view of all the circumstances of the case.⁵

§ 67. *Seamen*. — By a law of the United States, it is provided, that “no sum exceeding one dollar shall be recovered from any seaman or mariner (in the merchant service) by any person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage, for which such seaman or mariner engaged, shall be

¹ *Emmett v. Norton*, 8 Car. & Payne, 506.

² *Hunt v. De Blaquiere*, 5 Bing. R. 550; *Keegan v. Smith*, 5 Barn. & Cres. 118; *S. C.* 8 Dowl. & Ryl. 118; *Wilson v. Smyth*, 1 Barn. & Adolph. 801.

³ *Hodgkinson v. Fletcher*, 4 Camp. R. 70; *Hendley v. Westmeath*, 6 Barn. & Cres. 200; *Mizen v. Pick*, 3 Mees. & Welsb. 481; *Nurse v. Craig*, 2 Bos. & Pul. N. R. 148.

⁴ *Mizen v. Pick*, 3 Mees. & Welsb. 481.

⁵ *Hodgkinson v. Fletcher*, 4 Camp. R. 70.

ended." With this exception, seamen are under no special disability to buy and sell.

§ 68. *Slaves.* — The next class of persons, who are incompetent to contract, is one which, among modern civilized nations, alone exists in that which professes, as the fundamental principle of its government, the freedom and equality of all, and consists of slaves. This class would, perhaps, come more properly under the head of subjects of sale, since the law of sale applies to them in that relation, rather than in the relation of purchaser or seller, — yet, in consideration, that they may buy themselves, they are treated here as *persons*. In several of the States, in the United States, the color of a negro affords a presumption that he is a slave, and it is incumbent upon him to show the falsity of the presumption, in order to entitle himself to freedom.¹ Slavery, in America, annihilates almost every political and civil right, of the person in bondage, and therein differs from the slavery of eastern nations, and of the feudal age, by which the slave was less arbitrarily degraded, and in which his humanity was more fully recognized.² In the slaveholding portions of the United States, slaves are divested, in most respects, of their personality, and are treated as mere goods and chattels.³ They can, therefore, bring no actions, and acquire no property by descent. They are incompetent to make any purchase, or any sale, except of themselves;⁴ their only contract, which is recognized as valid, being a contract with their master for their manumission.⁵ They are

¹ *Burke v. Ive*, 6 Gill & Johns. R. 136; *Fix v. Lambson*, 3 Hals. 275; *Gober v. Gober*, 2 Hayw. 170; *Gentry v. McMinnis*, 3 Dana's R. 382.

² *Bynum v. Bostick*, 4 Dess. R. 267; Am. Jur. 18, 21.

³ *Walden v. Payne*, 2 Wash. R. 1; *Withers v. Smith*, 4 Bibb, R. 170; *Plumpton v. Cook*, 2 A. K. Marsh. 450.

⁴ *Cunningham's Heirs v. Cunningham's Ex'ors*, Cam. & Norwood, (N. Car.) 356; *Glen v. Hodges*, 9 Johns. R. 67; *Beall v. Joseph*, Hardin's R. 52.

⁵ *Williams v. Brown*, 3 Bos. & Pul. 69; *Ketletas v. Fleet*, 7 Johns. R.

treated as personal estate in attachments;¹ and are assets in the hands of the executor.² They also come within the operation of the Statute of Frauds respecting loans of goods and chattels.³ Indeed, so far has this legal rule treating them as chattels been pushed, that where a vessel was found at sea with slaves on board, but without white men, it was held in South Carolina to be a case of Derelict; no *person* being on board.⁴

§ 69. All persons, who are not included within these excepted classes, are competent to make and bind themselves by the contract of sale. There are, indeed, certain limitations and modifications of an absolute power to contract, which obtain in respect to persons acting *in autre droit*; such as agents, partners, factors. The rights, duties, and liabilities of these classes are governed by intricate and peculiar rules, which it cannot come within the scope of the present work fully to consider, and the development of which, with their proper modifications, would require a larger space than will be allotted to the whole of the present treatise. There are, however, certain general principles relating to contracts of sale, made by persons whose general business it is to contract in behalf of the principal parties, which it would seem proper to notice in this connection, and these will, therefore, form the subject of the next chapter.

367; *Comm. v. Clements*, 6 Binn. R. 206; *Stiles v. Richardson*, 4 Yeates, R. 82; *Hall v. Mullin*, 5 Har. & Johns. R. 190.

¹ *Plumpton v. Cook*, 2 A. K. Marsh. R. 450.

² *Walden v. Payne*, 2 Wash. R. 1.

³ *Withers v. Smith*, 4 Bibb, R. 170.

⁴ *Flinn v. The Leander*, Bee's R. 260.

CHAPTER III.

OF CONTRACTS OF SALE BY AGENTS.

§ 70. It is evident that the original parties to a contract of sale, where they are competent to contract, are not bound personally to exercise their powers, but may employ an agent to act for them, and negotiate the agreement; and in all cases where the agent acts properly, and within the limits of his authority, the principal will be bound, in the same manner, and to the same extent, as if he had acted personally. So, also, although the agent transgress the limits of his authority, yet, if he be invested by the principal, with an ostensible authority in relation to any matter or thing, and if special credit be given to his representatives and acts in respect thereto, the principal will be bound. Where power is conferred upon him to do any act, it is always construed to include all necessary, or usual, or proper modes and means to accomplish it; since to authorize the doing of an act, and at the same time to deny the proper means of doing it, would be idle and absurd.¹ But no authority to do a particular act or series of acts, will empower the agent to do acts of a different kind, or to do any thing, which is improper and unusual.² Thus, a power of attorney to sell, assign,

¹ *Forrester v. Bordman*, 1 Story, R. 43; *Howard v. Baillie*, 2 H. Black. R. 618; Story on Agency, § 58, *et seq.*; *Withington v. Herring*, 5 Bing. R. 442; *Rogers v. Kneeland*, 10 Wend. R. 218; *Fenn v. Harrison*, 4 T. R. 177.

² *Attwood v. Munnings*, 7 Barn. & Cres. 279; *Ducarrey v. Gill*, 1 Mood.

and transfer stock, will not empower the attorney to pledge it.¹ So, also, a general authority to sell, will only authorize a sale on credit, when such is the usage of the trade.² The authority of the agent, though given in general terms, is always restricted to those acts, which are incidental and pertinent to the particular subject-matter of the agency.³ But if he be misled by the form of the instrument giving him authority, or by any act or omission of the principal, the principal will be bound.⁴

§ 71. There are two species of agency: 1st. A special agency; 2d. A general agency. A special agency is created when authority is given to do a single act; as, if a person be employed to purchase a particular parcel of merchandise, or a particular horse. A general agency exists when authority is given to do all acts connected with, and incidental to, a particular business, or transaction, — such as a general authority given to a factor or broker to buy and sell all goods, or to negotiate all contracts of a certain description; or, to a master of a ship to superintend all things relating to the ship. If a special agent exceed the special and limited authority conferred upon him, the principal is not bound by his acts; but a general agent can bind his principal by all acts done within the general scope of his authority.⁵ Whoever deals with a special agent, is, there-

& Malk. 450; Story on Agency, § 62, 67; *De Bouchout v. Goldsmidt*, 1 Taunt. R. 219; *Rossiter v. Rossiter*, 8 Wend. R. 494; *Hubbard v. Elmer*, 7 Wend. R. 446.

¹ *Attwood v. Munnings*, 7 Barn. & Cres. 278.

² *Forrester v. Bordman*, 1 Story, R. 43; *Ekins v. Macklish*, Amb. R. 184; *Scott v. Surman*, Willes, R. 407; *Goodenow v. Tyler*, 7 Mass. R. 136.

³ *Ibid.*; *Hubbard v. Elmer*, 7 Wend. R. 446; *Kelgour v. Finlyson*, 1 H. Black. R. 155; Story on Agency, § 69.

⁴ *Loraine v. Cartwright*, 3 Wash. Circ. R. 151; *Dodge v. D'Wolf*, Mass. Circ. Ct. 1833; *Courcier v. Ritter*, 4 Wash. Circ. R. 551; *De Tastet v. Crousillat*, 2 Wash. Circ. R. 132; Story on Agency, § 79, 82.

⁵ *Fenn v. Harrison*, 4 T. R. 177; *Waters v. Brogden*, 1 Younge &

fore, obliged to acquaint himself with the *actual* extent of his authority ; and in dealing with him, he acts at his peril. But a person dealing with a general agent need only assure himself, that the agent is acting within his *apparent* authority.¹ Thus, if a person, not being a horse-dealer, employ another to carry his horse to market and sell him, with orders not to warrant him, the principal is not bound by the warranty of the agent. But if a horse-dealer send his servant to market with a horse to sell, and the servant have been accustomed to sell and warrant in behalf of his master, a warranty by him would be binding on the principal.² So, also, if a seller employ a third person to weigh and deliver goods to the vendee, such agent cannot bind his principal by a warranty of the quality of the goods.³

§ 72. In the first place, as to the rights of an agent. He is entitled to receive a compensation for his services, which is usually by a commission, determined, in the absence of any particular agreement, by the general usage in the particular business, in respect to which the agency is created ; or is, in the absence of such usage, determined by the worth of the services

Jerv. 457 ; *Daniel v. Adams*, Ambl. R. 498 ; *Woodin v. Burford*, 2 Crompt. & Mees. 391 ; *Jordan v. Norton*, 4 Mees. & Welsb. 155 ; *Sykes v. Giff*, 5 Mees. & Welsb. 645 ; *Schimmelpennich v. Bayard*, 1 Peters, R. 264.

¹ Story on Agency, § 73, 126 - 133 ; *Allen v. Ogden*, 1 Wash. Circ. R. 174 ; *Smith on Merc. Law*, 107, 108 ; *Whitehead v. Tuckett*, 15 East, R. 408 ; *Nickson v. Brohan*, 10 Mod. R. 109 ; *Thorold v. Smith*, 11 Mod. R. 8 ; *East India Co. v. Hensley*, 1 Esp. R. 111 ; *Ellis v. Turner*, 8 T. R. 531 ; *Woodin v. Burford*, 2 Crompt. Mees. & Rose. 395 ; *Jordan v. Norton*, 4 Mees. & Welsb. 155 ; *Guerreiro v. Peile*, 3 Barn. & Ald. 616 ; *Locke v. Stearns*, 1 Metc. R. 560 ; *Paley on Agency*, by Lloyd, p. 199, note ; *Fitzherbert v. Mather*, 1 T. R. 12, 16 ; *Johnson v. Jones*, 4 Barb. Sup. Ct. R. 369.

² *Fenn v. Harrison*, 3 T. R. 760, 761 ; *Pickering v. Busk*, 15 East, R. 45 ; Story on Agency, § 132, and note ; *Helyear v. Hawke*, 5 Esp. R. 72, 75. See also, Post.

³ *Richmond Trading Co. v. Farquar*, 8 Blackford R. 89.

performed.¹ Extraordinary commissions are also allowed in cases where the agent assumes the risk of sales made by him, by guaranteeing payment, which are called commissions *del credere*. But before he can claim compensation, he must have performed all his duty without fraud, misconduct, or gross negligence.² He has also a right to be reimbursed for all advances, and expenses, and losses, legitimately incurred in the course of the agency, and for damages immediately occasioned by any wrongful act done by him innocently at the instance of the principal, or in course of the agency.³ An agent has also a particular lien on the property of his principal in his hands; but he has not a general lien, unless by usage, or special agreement. A factor, however, has a general lien upon the goods sold, and upon the proceeds of sale in his hands, and upon the goods on the way to him at the death of the principal.⁴

§ 73. An agent may also sue third persons in behalf of his principal in three cases: 1st. When an express contract is made

¹ *Eicke v. Meyer*, 3 Camp. R. 412; *Cohen v. Paget*, 4 Camp. R. 96; *Reberts v. Jackson*, 2 Stark. R. 225; *Chapman v. De Tastet*, 2 Stark. R. 294; *Bower v. Jones*, 8 Bing. R. 65; *Robinson v. New York Ins. Co.*, 2 Caines, Cas. 357; *Miller v. Livingston*, 1 Caines, Cas. 349; *Story on Agency*, § 326, *et seq.*; *Armstrong v. Toler*, 11 Wheat. R. 261; *Wyburd v. Stanton* 4 Esp. R. 179; *Josephs v. Pebrer*, 3 Barn. & Cres. 639; *Waldo v. Martin*, 4 Barn. & Cres. 319.

² *Hamond v. Holiday*, 1 Car. & Payne, 384; *Broad v. Thomas*, 7 Bing. R. 99; *Dalton v. Irvin*, 4 Car. & Payne, 289; *Reed v. Rann*, 10 Barn. & Cres. 438; *Dodge v. Tileston*, 12 Pick. R. 328; *Savage v. Birkhead*, 20 Pick. R. 167.

³ *Adamson v. Jarvis*, 4 Bing. 66; *Allaire v. Ouland*, 2 Johns. Cas. 54; *Avery v. Halsey*, 14 Pick. R. 174; *Powell v. Trustees of Newburg*, 19 Johns. R. 284; *Story on Agency*, § 341; *Pothier, Traité de Mandat*, n. 75, 76.

⁴ *Story on Agency*, § 376, and cases cited; *Drinkwater v. Goodwin*, Cowp. R. 251; *Foxcroft v. Devonshire*, 2 Burr. R. 931; *Houghton v. Matthews*, 3 Bos. & Pul. 485.

with him personally; 2d. When he is the ostensible principal; 3d. When by usage of trade he is authorized to act as principal, although he is known to be an agent. His right to sue may, however, be ordinarily superseded by the exercise of such right by the principal;¹ unless the agent contract with the third person by an instrument under seal; or unless exclusive credit be given to the agent; or unless his lien on the property exceeds or equals its value.

§ 74. In the next place, as to the duties of an agent. He is bound to exercise ordinary diligence and reasonable skill; and he is responsible for such injuries as arise from want thereof.² He is also bound to execute not only the direct orders of his principal, but also the incidental orders, which are naturally or necessarily implied, either from usage of trade, or from a previous course of dealing, or from the circumstances of the case.³ Thus, his duty to insure may arise, not only from an express order, but from usage of trade, or a previous course of practice between the parties.⁴ He must also comply strictly with his

¹ Story on Agency, § 373, *et seq.* 422-424; *Coppin v. Craig*, 7 Taunt. R. 243; *Morris v. Cleesby*, 1 Maule & Selw. 576; *Coppin v. Walker*, 7 Taunt. R. 237; *Walter v. Ross*, 2 Wash. Circ. R. 283; *Edwards v. Golding*, 20 Vermt. (5 Washb.) R. 30.

² Story on Bailm. § 431, 432; *Park v. Hammond*, 6 Taunt. R. 495; *Danew v. Daverill*, 3 Camp. R. 451; *Leave v. Prentice*, 8 East, R. 348; *Simpson v. Swan*, 3 Camp. R. 291; *Madeira v. Townsley*, 12 Martin, R. 365; *Dartnall v. Howard*, 4 Barn. & Cres. 315; *Leverick v. Meigs*, 1 Cowen, R. 615; Story on Agency, § 183, and cases cited. The same rule also prevails in the Roman, Scotch, and French Law. Heinnecc. Elem. Inst. Lib. 3, tit. 14, § 788; Id. Pand. Lib. 17, tit. 1, § 233; Pothier, Œuvres, Edit. 1781, 4to., p. 455; Ersk. Inst. B. 3, tit. 1, § 21; Id. tit. 3, § 36; 1 Bell. Comm. § 441, p. 387.

³ *Smith v. Lascelles*, 2 T. R. 189; *Morris v. Summerl*, 2 Wash. Circ. R. 203; *Wallace v. Tellfair*, 2 T. R. 188, note; Story on Agency, 189, *et seq.*; *Moore v. Mourgue*, Cowp. R. 479.

⁴ *Ibid.*; 1 Phil. on Ins. ch. 22, p. 519 to 524; Marsh. on Ins. B. 1, ch. 8, p. 209, 297, by Condry, 301, note.

instructions, unless they be unlawful or impossible, or would frustrate the object of the principal; or unless unforeseen emergencies arise, rendering a strict compliance improper; and if he do not, he will be liable, unless the deviation be in a slight and unimportant particular.¹ Where no instructions are given, he should follow the usage of the trade, or the custom applicable to the particular agency, and any unnecessary deviation therefrom will render him liable;² unless, indeed, such a course would operate as an injury to the interest of the principal. He should also keep regular accounts and vouchers, or he will be liable for any losses growing out of his negligence to do so.³ He must also keep his property distinct from that of his principal; for if they be confounded together, the whole will become the property of the principal, as a penalty for his carelessness.⁴

§ 75. In the next place, as to the liabilities of agents. An agent is liable to his principal for the consequences of all acts and contracts, beyond the strict limitations of his actual authority. He cannot, therefore, purchase conditionally, when he should purchase unconditionally; or purchase a part of a thing, when he is commissioned to purchase the whole. But if he exceed his authority by doing something merely additional,—as, if being authorized to buy a hundred bales of cotton he buy

¹ *Catlin v. Bell*, 4 Camp. R. 183; Story on Agency, § 190–197; *Dusar v. Perit*, 4 Binn. R. 361; Chitty on Comm. & Man. ch. 3, p. 218, 219, note 1; *Cornwall v. Wilson*, 1 Ves. R. 510; *Young v. Cole*, 3 Bing. N. C. 724; *Massey v. Banner*, 1 Jac. & Walk. R. 241; *Smith v. Cologan*, 2 T. R. 188, note (a); *Russell v. Hankey*, 6 T. R. 12; *Belchier v. Parsons*, Ambl. R. 219.

² *Ibid.*; *Littlejohn v. Ramsey*, 16 Martin, R. 655; *Leverick v. Meigs*, 1 Cowen, R. 646; *Sadock v. Barton*, Yelv. R. 202; *Anon.* 12 Mod. R. 514.

³ *White v. Lady Lincoln*, 8 Ves. R. 363; S. C. 15 Ves. R. 441; *Chedworth v. Edwards*, 8 Ves. R. 49; 1 Story, Eq. Jurisp. § 468, 623.

⁴ *Fletcher v. Walker*, 3 Madd. R. 73; *Caffrey v. Darby*, 6 Ves. R. 496; *Wren v. Kinton*, 11 Ves. R. 379; *Massey v. Banner*, 1 Jac. & Walk. 241; *McDonell v. Harding*, 7 Sim. R. 178.

two hundred, his contract will be binding on the principal as far as it was authorized.¹ But if his power be improperly exercised, or, if the unauthorized part cannot be separated from the authorized part, he will be liable to his principal for the whole.² An agent is also liable for the consequences resulting from a want of ordinary diligence and reasonable skill. He is also liable for any omission of duties; as the storage or insurance of the goods; or, in obtaining payment from third persons to whom he has sold; or, in omitting to keep regular vouchers of all transactions in the course of his agency; or, in confounding his own goods with those of his principal.³

§ 76. An agent is liable to third persons, whenever exclusive credit is given to him, or whenever credit is given to both him and his principal, (which is a question of fact for a jury;)⁴ or when he exceeds his authority, unless the person with whom he is dealing knows that he is so doing;⁵ or, when he either holds himself out as principal, or does not disclose his agency, or suppresses the name of his principal;⁶ or, when he assumes a personal liability, as by giving a note in his own name for

¹ Story on Agency, § 165, 175, 176, 192; *Howard v. Bailie*, 2 H. Black. R. 623; *Manella v. Barry*, 3 Cranch, R. 415; 2 Kent, Comm. Lect. 41, p. 618.

² *Batty v. Carswell*, 2 Johns. R. 48; 1 Story on Agency, § 166; 1 Story, Eq. Jurisp. § 96, 177, and note; *Bright v. Boyd*, 1 Story, R. 487; *Zouch v. Woolston*, 2 Burr. R. 1146; *Alexander v. Alexander*, 2 Ves. R. 644; 2 Kent, Comm. Lect. 41, p. 618.

³ Ante, § 74; *Caffrey v. Darby*, 6 Ves. R. 496; *Davis v. Garrett*, 6 Bing. R. 716; *Smith v. Lascelles*, 2 T. R. 186-188, note.

⁴ Story on Agency, § 261, 279; *Scrace v. Whittington*, 2 Barn. & Cres. 11; *Iveson v. Conington*, 7 Wend. R. 106.

⁵ *Smout v. Ilbery*, 10 Mees. & Welsb. 1.

⁶ *Owen v. Gooch*, 2 Esp. R. 567; *Ex parte Hartop*, 12 Ves. R. 352; *Paterson v. Gandasequi*, 15 East, R. 62; *Stackpole v. Arnold*, 11 Mass. R. 27; *Raymond v. Comm. and Eagle Mills*, 2 Metc. R. 319; *Waring v. Mason*, 18 Wend. R. 425.

goods bought in behalf of his principal ;¹ or, when there is no other person, who is legally responsible, — unless credit be exclusively given to the principal.² An exclusive credit will be presumed to be given to the agent in certain cases ; as, where a factor buys and sells goods in a foreign country ; or, where a master of a ship makes a contract in behalf of the ship.³ An agent is also liable to third persons for his misfeasances and positive wrongs, although his principal be also a wrongdoer. But he is only liable to his principal for omissions and nonfeasances in the course of his duty.⁴

§ 77. But, in all cases, whatever may have been the conduct of the agent, if it be ratified by the principal, he will stand in the same position as if he had originally been possessed of authority. “ *Omnis ratihabitio retrotrahitur et mandato æquiparatur*,” is the maxim of the law ; and a ratification once made, becomes instantly obligatory, and cannot be revoked.⁵

¹ *Alford v. Egglisfield*, Dyer, R. 230 b ; *Talbot v. Godbolt*, Yelv. R. 137 ; *Jones v. Littleddale*, 6 Adolph. & El. 486 ; *Norton v. Harron*, 1 Car. & Payne, 648 ; S. C. 1 Ry. & Mood. 229 ; *Leadbitter v. Farrow*, 5 Maule & Selw. 345 ; *Stackpole v. Arnold*, 11 Mass. R. 27 ; *Thomas v. Bishop*, 2 Strange, R. 955.

² *Thatcher v. Dinsmore*, 5 Mass. R. 299 ; *Forster v. Fuller*, 6 Mass. R. 58 ; *Sumner v. Williams*, 8 Mass. R. 162 ; *Hills v. Bannister*, 8 Cowen, R. 31 ; *Childs v. Monins*, 2 Brod. & Bing. 460 ; *Lambert v. Knott*, 6 Dowl. & Ryl. 122 ; *King v. Thom*, 1 T. R. 487 ; *Parrott v. Eyre*, 10 Bing. R. 292 ; *Burls v. Smith*, 7 Bing. R. 705 ; *Tobey v. Clafflin*, 3 Sumner, R. 379.

³ *Gonzales v. Sladen*, Bull. N. P. 130 ; *Patterson v. Gandasequi*, 15 East, R. 62 ; *Thompson v. Davenport*, 9 Barn. & Cres. 78 ; *Houghton v. Matthews*, 3 Bos. & Pul. 489 ; 1 Bell, Comm. § 418, p. 398, (4th ed.) ; *Abbott on Ship*. Pt. 2, ch. 2, § 3, p. 91 ; Id. § 5, p. 95 ; *Pothier on Oblig.* n. 82, 448.

⁴ *Farebrother v. Ansley*, 1 Camp. R. 340 ; *Cameron v. Reynolds*, Cowp. R. 403 ; *Randleson v. Murray*, 8 Adolph. & El. 109 ; S. C. 3 Nev. & Per. 239 ; *Milligan v. Wedge*, 12 Adolph. & El. 737 ; *Stephens v. Elwall*, 4 Maule & Selw. 259 ; *McCombie v. Davies*, 6 East, R. 538.

⁵ *Smith v. Cologan*, 2 T. R. 189, note ; *Clark's Ex'ors v. Riemsdyk*, 9 Cranch, R. 153.

It will not, however, be obligatory, unless it be made with a full knowledge of the facts and circumstances of the case, although they may have been innocently concealed or misrepresented.¹ It is not necessary, however, that it should be formally made; but it may arise by implication from the circumstances of the case, and from the silence of the principal, when it was incumbent upon him to object, if he intended not to ratify.² If the transaction be originally void, no ratification by the principal will render it operative; but if it be merely voidable, a ratification will give it complete validity.³

§ 78. The most common classes of commercial agents are Auctioneers, Brokers, Factors, Consignees, Supercargoes, Shipshusbands, Masters of ships, and Partners, — and these we now propose very briefly to consider.

§ 79. 1st. *Auctioneers*. — An auctioneer is a person who sells goods at public auction for a commission on the proceeds of sale. He differs from a broker in two respects; in the first place, in the exercise of his functions of auctioneer, he cannot buy, either for himself, or for a third person; and in the second place, he cannot sell at private sale; while a broker can both

¹ *Bell v. Cunningham*, 3 Peters, R. 69, 81; *Copeland v. Merchant's Ins. Co.*, 6 Pick. R. 198; *Conn. v. Penn.*, 1 Peters, Circ. R. 496; *Horsefall v. Fauntleroy*, 10 Barn. & Cres. 755.

² *Bloodgood v. Goodrich*, 9 Wend. R. 68; S. C. 13 Wend. 525; *Hanford v. McNair*, 9 Wend. R. 51; *Codwise v. Hacker*, 1 Caines, Cas. 526; *Ward v. Evans*, Salk. R. 442; S. C. 2 Ld. Raym. R. 928; *Thorold v. Smith*, 11 Mod. R. 88; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Bank of Columbia v. Patterson's Adm'rs*, 7 Cranch, R. 299; *Cady v. Shepherd*, 11 Pick. R. 400; *Forrestier v. Bordman*, 1 Story, R. 43; *McLean v. Dunn*, 9 Bing. R. 722; *Palmerton v. Huxford*, 4 Denio R. 166; *Bryant v. Moore*, 26 Maine (13 Shepley) R. 84; *Johnson v. Jones*, 4 Barb. Sup. Ct. R. 369.

³ *McLean v. Dunn*, 9 Bing. R. 722; *Wilkinson v. Leland*, 2 Peters, R. 661; *Vernon's case*, 4 Coke, R. 2 (b;) Com. Dig. Confirmation.

buy and sell at private sale.¹ An auctioneer is solely the agent of the seller of the goods, until the sale is effected, and then he becomes also the agent of the buyer for particular purposes.² In virtue of his being the agent of the seller, he is responsible to him for ordinary diligence and skill in the storage of the goods, but he is not liable for inevitable accidents.³ So, also, he is bound to observe his special instructions in regard to the sale, unless they would operate as a fraud; and if no instructions be given, he must observe the custom of the trade. But in no case is he authorized, without the express order of his principal, to dispose of the goods at private sale, since that would be beside his functions as auctioneer.⁴ He has a right to prescribe the rules of bidding, and the terms of sale; and his verbal declarations at the sale, unless they contravene the printed regulations, or the written particulars of the sale, are admissible against the principal, and binding on him, as an incident to his authority to sell; but if they contradict the printed conditions, they are not binding.⁵ The agency of the auctioneer in respect to the vendor, is a private trust, which cannot be delegated by him even to his own clerk, but he may employ a person to use the hammer, and to cry out the goods, provided it be done,

¹ Story on Agency, § 27; *Wilkes v. Ellis*, 2 H. Black. R. 555; *David v. Adams*, Ambl. R. 495; *Barker v. Marine Ins. Co.*, 2 Mason, R. 369. See Post, §

² *Williams v. Millington*, 1 H. Bl. 81, 84, 85; *Girard v. Taggart*, 5 Serg. & Rawle, 19, 27; *Emmerson v. Heelis*, 2 Taunt. R. 38, 48; *Kemeys v. Proctor*, 1 Jac. & Walk. 350.

³ *Maltby v. Christie*, 1 Esp. R. 340; Story on Bailm. § 431.

⁴ *Jones v. Nanney*, 13 Price, R. 76; *S. C. McLell. R.* 25; *Bexwell v. Christie*, Cowp. R. 395; *Denew v. Daverell*, 3 Camp. R. 451; *David v. Adams*, Ambl. R. 495.

⁵ *Gunnis v. Erhart*, 1 H. Black. R. 289; *Howard v. Braithwaite*, 1 Ves. & Bean, 209, 210; *Powell v. Edmunds*, 12 East, R. 6; *Slark v. Highgate Archway Co.*, 5 Taunt. R. 792; *Shelton v. Livius*, 2 Crompt. & Jerv. 411. But whether an auctioneer has a right to warrant, without special instructions, seems to be doubtful. See the above cases, and *The Monte Allegre*, 9 Wheat. R. 645, 647.

under his immediate supervision and in his presence ;¹ his temporary absence during a part of the time occupied by the sale would not invalidate it.²

§ 80. As soon as the goods are knocked down to the seller, the auctioneer becomes the agent for both parties, for the purpose of making a memorandum of the terms of the sale ; and an entry by him in his book of the terms of the sale, will satisfy the requisition of the statute of frauds.³ But this power is also incapable of delegation to any other person, though it be a clerk ; unless, indeed, his clerk be present and take from his lips the terms of the sale, being merely the instrument by which they are conveyed to paper.⁴ But a memorandum cannot be made by a clerk not present at the sale, and not making the entry in the presence of the vendee and with his implied consent, although the auctioneer direct him to do so.⁵

§ 81. An auctioneer is also liable personally as a vendor to the purchaser at the sale, unless, at the time of the sale, he disclose the name of his principal.⁶ But, as he is deemed to be the agent of the vendor only in respect of the sale, after the sale is made, he has no incidental authority, to deal with the

¹ *Coles v. Trecothick*, 9 Ves. R. 243 ; *Commonwealth v. Harnden*, 9 Pick. R. 482 ; *Ess v. Trescott*, 2 Mees. & Welsb. 385 ; *Coombe's case*, 9 Coke, R. 75 ; *Com. Dig. Atty. C. 3* ; *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386 ; *Solly v. Rathbone*, 2 Maule & Selw. 298.

² *Commonwealth v. Harnden*, 9 Pick. R. 482.

³ *Williams v. Millington*, 1 H. Black. R. 85 ; *Emmerson v. Heelis*, 2 Taunt. R. 38 ; *White v. Proctor*, 1 Jac. & Walk. 350 ; *M'Comb v. Wright*, 4 Johns. Ch. R. 659 ; *Hinde v. Whitehouse*, 7 East, R. 538 ; *Bird v. Boulter*, 4 Barn. & Adolph. 443 ; *Story on Agency*, § 27.

⁴ *Wright v. Darrah*, 2 Camp. R. 203 ; *Farebrother v. Simmons*, 5 Barn. & Ald. 333 ; *Henderson v. Barnwell*, 1 Younge & Jerv. 389.

⁵ *Alna v. Plummer*, 4 Greenl. R. 458 ; *Henderson v. Barnwall*, 1 Young & Jerv. 389. See Post, §

⁶ *Mills v. Hunt*, 20 Wend. R. 431 ; *Hanson v. Roberdean, Peake*, R. 120.

purchaser, as to the terms upon which a title is to be made, without some special authority for that purpose.¹

§ 82. Again, an auctioneer has a special property in the goods sold, and a lien thereon, and on the proceeds of sale, for his commissions; and he may sue the purchaser in his own name, as well as in the name of the principal.² If, however, he make the memorandum of the terms of sale, as agent, he cannot sue the purchaser in his own name, but must sue him in the name of his principal; because the agent must not appear as one of the parties in the action.³ But if the clerk, following his dictation, make the entry, the auctioneer may sue in his own name.⁴

§ 83. Where by the terms of a sale by auction, a deposit is to be made in the auctioneer's hands, he becomes the stakeholder of both parties, and he must retain possession of it; and if he surrender it to the vendor, he will be liable therefor to the vendee, in case the terms of the sale be not complied with. Nor does it matter, that he have received no notice from the vendee to retain it, nor that he have acted in entire good faith in the transaction.⁵ But he is not liable, ordinarily, for interest thereon, unless he receive notice that the contract is rescinded.⁶

§ 84. In all other respects, an auctioneer has the general liability of an ordinary agent. We shall, hereafter, have occasion

¹ *Seton v. Slade*, 7 Ves. R. 276; *Paley on Agency*, by Lloyd, 208; *Story on Agency*, § 108.

² *Williams v. Millington*, 1 H. Black. R. 81, 85; *Girard v. Taggart*, 5 Serg. & Rawle, 19, 27.

³ *Bird v. Boulter*, 4 Barn. & Adolph. 446.

⁴ *Ibid.*

⁵ *Edwards v. Hodding*, 5 Taunt. R. 815; *Hanson v. Roberdean*, Peake, R. 120; *Gray v. Gutteridge*, 3 Car. & Payne, 40; *Burrough v. Skinner*, 5 Burr. R. 2639. See Post, §

⁶ *Gaby v. Driver*, 2 Younge & Jerv. 549; *Lee v. Munn*, 1 B. Moore, R. 481; *S. C.* 8 Taunt. R. 45; *Carlton v. Bragg*, 15 East, R. 223.

to treat somewhat more fully of his duties and liabilities, in considering the law applicable to sales at auction.¹

§ 85. 2d. *Brokers*. — A broker is an agent who is employed to negotiate sales between the parties for a compensation in the form of a commission, which is commonly called brokerage. In the proper exercise of his functions, he does not act in his own name, but only as a middle-man.² His business consists in negotiating exchanges; or in buying and selling stocks, and goods, or ships, or cargoes; or in procuring insurances and settling losses; and, according as he confines himself to one or other of these branches, he is called an exchange broker, a stock broker, a merchandise broker, a ship broker, or an insurance broker.³ A broker differs materially from a factor. He has no possession of the goods in respect to which he negotiates a bargain, and he is not authorized to sell in his own name;

¹ See Post, Sales by Auction, § 459.

² Among the Romans was a class of persons called *Proxenætæ*, not differing much from a broker in their functions, and receiving also a compensation for negotiating sales. “Sunt enim hujus modi hominum, ut tam in magna civitate, officinæ. Est enim *Proxenetarum* modus, qui emptionibus, venditionibus, commerciis, contractibus licitis utiles, non adeo improbabili, more se exhibent. (Dig. Lib. 50, tit. 14, l. 3;) *Proxenetica* jure licito petuntur. Si *proxeneta* intervenerit faciendi nominis, ut multi solent, videamus an possit quasi mandator teneri? Et non puto teneri. Quia hic monstrat magis nomen quam mandat, tametsi laudet nomen.” Dig. Lib. 50, tit. 14, l. 1, 2. Domat, also, gives a full description of a broker according to our law. He says: “The engagement of a broker is like to that of a proxy, a factor, and other agents; but with this difference, that, the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affairs in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties, in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner, as to put those who employ him, in a condition to treat together personally.”

³ Story on Agency, § 32; 2 Kent, Comm. Lect. 41, p. 622; Pott v. Turner, 6 Bing. R. 702; Rawlinson v. Pearson, 5 Barn. & Ald. 124; Highmore v. Molloy, 1 Atk. R. 206.

while a factor, as we shall see, not only may have possession of the goods, which he sells, but he also has a special property therein, and may sell them in his own name.¹ A person may, however, unite in himself the double character of broker and factor, for there is no legal objection to his so doing; but his duties and liabilities in respect to each character are none the less different,² and they should be carefully distinguished. For example, it is not the business of a person, acting as broker, to see to the delivery of the goods sold, but it may become his duty to

¹ *Baring v. Corrie*, 2 Barn. & Ald. 137, 148; *Pott v. Turner*, 6 Bing. R. 702. In *Baring v. Corrie*, Mr. Justice Holroyd said: — “A factor, who has possession of goods, differs materially from a broker. The former is a person to whom goods are sent, or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting-off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and, besides, the employing of a person to sell goods as a broker, does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said, that by these means, the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and indicia of property. The rule stated in the case in *Salkeld* must be taken with some qualifications; as, for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound; or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of *caveat emptor* applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of set-off cannot be allowed.”

² 1 Bell, *Comm. B.* 3, P. 1, ch. 4, art. 409, p. 386 (4th ed.): *Id.* p. 477, 478, (5th ed.); *Brown v. Boshmer*, 11 Clark & Finnell. 1, 44; *Story on Agency*, § 32, a.

do so, if he also act in the capacity of factor.¹ So, also, he cannot, as broker, sell in his own name, but, as factor, he may.²

§ 86. In respect to the commission of a broker, the rule is, that he is not entitled to it, nor even to a compensation for his trouble, if he execute his duties in such a manner as that no benefit results from them.³ Nor is he entitled to a commission, where he has been guilty of gross misconduct in selling goods.⁴ So, also, if the negotiation be broken off, and the contract be not completed, the broker will not be entitled to recover commissions, although he have been guilty of no fault, and even although the act of the owner prevent the completion of the contract.⁵ But, where a negotiation is commenced by the broker, the parties cannot afterwards, by agreement between themselves, withdraw the matter from his hands, and deprive him of his commission, but he will be entitled thereto, provided he was, up to a certain time, the middle-man, although the contract be afterwards completed without his instrumentality.⁶

§ 87. Primarily, a broker is the agent of the person who employs him, but as soon as he negotiates with any person, as vendee, he becomes also the agent of the latter, for the purpose of receiving and transmitting propositions. So, also, he is the agent of both parties, for the purpose of making the memorandum required by the statute of frauds. The practice of brokers is to keep books, in which they enter the terms of any contract which they negotiate, and the names of the parties; they then

¹ *Brown v. Boshmer*, 11 Clark & Finnell. 1, 44.

² *Baring v. Corrie*, 2 Barn. & Ald. 148.

³ *Hamond v. Holiday*, 1 Car. & Payne, 384.

⁴ *White v. Chapman*, 1 Stark. R. 113.

⁵ *Read v. Rann*, 10 Barn. & Cres. 438; *Broad v. Thomas*, 7 Bing. R. 99; *S. C.* 4 Car. & Payne, 732; *Dalton v. Irwin*, 4 Car. & Payne, 289.

⁶ *Wilkins v. Martin*, 8 Car. & Payne, 1; *Murray v. Currie*, 7 Car. & Payne, 584.

deliver to the buyer a note of such entry, which is called a *sold note*, and a similar note to the seller, called a *bought note*, signed in their own name; and either the entry in the book, or the bought and sold notes, if signed by the broker, are a sufficient memorandum within the statute of frauds, unless they either of them omit sufficiently to state the terms, or unless they disagree with each other.¹ But if the bought and sold notes do not correspond with each other, or with the entry in the broker's books, the memorandum would not suffice, if the mistake occasioned any injury.²

§ 88. The broker, being invested with a personal trust, cannot delegate it to another, although the other be a sub-agent or clerk, unless with the express or implied consent of his principal to his so doing.³ So, also, he cannot, ordinarily, sell the goods of his principal in his own name, unless specially authorized; and if he do, his principal will have the same rights and remedies against the purchaser, as if his name had been disclosed. This rule is adopted, not only upon the ground, that having exceeded his authority, the principal is not bound, for the innocent buyer might nevertheless be injured thereby; but also, that he has neither the possession of the goods nor the indicia of possession, the vendee cannot be deceived into a belief, that he is the principal, or is acting otherwise than as a

¹ *Rucker v. Cammeyer*, 1 Esp. R. 105; *Hinde v. Whitehouse*, 7 East, R. 558; *Kemble v. Atkyns*, 7 Taunt. R. 260; *Henderson v. Barnwell*, 1 Younge & Jerv. 387; *Beal v. McKiernan*, 6 Louis. R. 407; *Clason v. Bailey*, 14 Johns. R. 584; *Davis v. Shields*, 26 Wend. R. 341; *Cowie v. Remfry*, 5 Moore, R. 232.

² *Ibid.*; *Thornton v. Kempster*, 5 Taunt. R. 786; *Mitchell v. Lapage*, Holt, N. P. R. 253; *Cumming v. Roebuck*, Holt, N. P. R. 172; *Bird v. Boulter*, 4 Barn. & Adolph. 440; Post, § ; *Davis v. Shields*, 26 Wend. R. 341; *Suydam v. Clark*, 2 Sandf. Sup. Ct. R. 133.

³ *Henderson v. Barnwell*, 1 Younge & Jerv. 387; Story on Agency, § 29, 109; *Magee v. Atkinson*, 2 Mees. & Welsb. 440.

broker.¹ But there are some exceptions to this rule, created by usage ; as in the cases of policies of insurance, which are commonly made in the name of the policy broker, and which he is then enabled to sue thereon.² Unless, however, he act in the capacity of factor, as well as of broker, he cannot, unless in the excepted cases created by usage, contract in his own name.³ He may of course be empowered to sell in his own name, which will, of itself, constitute him in so far a factor, and an authority to sell in his own name, may be implied from a previous course of dealing between the parties, — but this is a question for a jury.⁴

§ 88 *a*. But if a broker enter into a contract for an undisclosed principal, the latter may sue thereon in his own name ; and this rule obtains, despite a rule of the exchange, on which the contract is made, declaring, that a contract made for an undisclosed principal shall be regarded as the contract of the broker solely, and although this rule be known to the principal.⁵

§ 89. So, also, he cannot act as agent of both parties, where he is intrusted with authority to conclude the sale and fix the terms himself, in behalf of each ; for such a power would enable him to effect frauds. Thus, if A employ him to buy certain goods at the lowest price, and B employ him to sell similar goods at the highest price, he would not be authorized to make a sale of such goods between those parties.⁶ So, also, a broker cannot, ordinarily, buy or sell on credit, unless

¹ *Baring v. Currie*, 2 Barn. & Ald. 148.

² *Paley on Agency*, by Lloyd, 362 ; ³ *Chitty on Comm. & Man.* 210 ; *Baring v. Currie*, 2 Barn. & Ald. 137 ; *Story on Agency*, § 109.

³ *Baring v. Currie*, 2 Barn. & Ald. 148 ; *Johnston v. Usborne*, 11 Adolph. & Ell. 557.

⁴ *Kemble v. Atkins*, Holt, N. P. R. 434.

⁵ *Humfrey v. Lucas*, 2 Carr. & Kirw. 152.

⁶ *Story on Agency*, § 31 ; *Wright v. Dannah*, 2 Camp. R. 203.

he be justified in so doing by the usage of trade.¹ So, also, a broker has, ordinarily, no authority to receive payment for property sold by him, and if the purchaser make payment to him, he does so at his own risk, unless from other circumstances an authority to receive it can be inferred.² Insurance brokers are, however, considered to have acquired by usage an authority to adjust losses, and to receive payment of them; but they can only receive payment in money.³ But a broker may be authorized to receive payment, either in express terms, or by necessary implication from the circumstances; as, if he be empowered to sell as a principal; or, if he have been in the habit of receiving payment for the principal in previous dealings; and, in such cases, a payment to him will discharge the purchaser from all liability.⁴

§ 90. The vendor is bound by all acts done by the broker within the limits of his authority. If, therefore, he have authority to sell without any limitation as to price, he may sell at any price which he himself thinks is reasonable and fair, under the circumstances.⁵ So, also, if he be employed to purchase goods of a general description, he cannot be made liable for not procuring them of a particular quality, provided they answer to such description. So, also, if there be no restriction

¹ *Henderson v. Barnwell*, 1 Younge & Jerv. 387; *Paley on Agency*, by Lloyd, 212; *Story on Agency*, § 60.

² *Baring v. Corrie*, 2 Barn. & Ald. 137; *Campbell v. Hassell*, 1 Stark. R. 233; *Paley on Agency*, by Lloyd, 279, 280; *Story on Agency*, § 109.

³ *Todd v. Reid*, 4 Barn. & Ald. 210; *Scott v. Irving*, 1 Barn. & Ald. 605; *Bonsfield v. Creswell*, 2 Camp. R. 545; *Richardson v. Anderson*, 1 Camp. R. 43, note; *Story on Agency*, § 103, note, § 109; *Russell v. Bangley*, 4 Barn. & Ald. 395; *Bartlett v. Portland*, 10 Barn. & Cres. 760.

⁴ *Coates v. Lewes*, 1 Camp. R. 444; *Favenc v. Bennett*, 11 East, R. 36; *Whitehead v. Tuckett*, 15 East, R. 400; *Pickering v. Busk*, 15 East, R. 38.

⁵ *East India Co. v. Hensley*, 1 Esp. R. 111; *Paley on Agency*, by Lloyd, 208, 209.

as to the mode in which he shall sell goods, or, as to the terms of sale, he may sell by sample, or, with warranty.¹ But he cannot sell upon credit, unless he be justified in so doing by the usage in the particular transaction.²

§ 91. *Factors*. — A factor is an agent employed to sell the goods or merchandise of his principal, which are in his possession, for a commission. He is often called a commission merchant, or consignee; and the goods received by him for sale are called a consignment. If he reside in the same country as his principal, he is called a home-factor; if in a different country, he is called a foreign-factor. If he accompany a cargo on a voyage, and have it in charge to sell, he is called a supercargo.³ But under all these different titles, he is merely a factor, subject to all the liabilities, and having the same rights and duties of this class of agents. A factor differs from a broker, as we have seen, in several important particulars. He may buy and sell in his own name; and he has the goods or merchandise in respect to which his agency is created in his possession; while a broker, as such, cannot ordinarily buy and sell in his own name, and has no possession of the goods sold.⁴ The test, as to whether an agent is merely a broker or is a factor, is to be found in the question, whether he has any possession or special property in the subject-matter of sale; for if he had, he is in so far a factor, although he may unite the two characters. If he have no possession or special property, he is merely a broker, and his rights, duties, and liabilities are different.

¹ *Andrews v. Kneeland*, 6 Cowen, R. 354. *The Monte Allegre*, 9 Wheat. R. 613.

² *Henderson v. Barnwell*, 1 Younge & Jerv. 387.

³ *Beawes*, *Lex Merc.* 44, 47, (6th ed.)

⁴ See *Ante*, § 85; *Baring v. Corrie*, 2 Barn. & Ald. 143; 2 Kent, Comm. Lect. 41, p. 622, note; *Story on Agency*, § 34.

§ 92. In respect to his commission, the rule is, that a factor is always entitled thereto, if he have properly performed his duty. But if he be guilty of gross misconduct, or if he execute his duties in such a manner as to prevent any benefit to the principal, he will not be entitled to receive his commission.¹ So, also, a factor cannot recover the difference, when through his negligence the proceeds of the sale are not equal to the expenses; nor can he recover expenses occasioned by his negligence.² Whether, when the purchaser fails, he is entitled to receive commission, is a question which depends upon the usage of trade in the particular place, and in the particular business,³ and in respect to which there does not seem to be any distinct and independent rule of law. Again, whenever he undertakes to guarantee to his principal the payment of the purchase-money, he is entitled to an additional compensation therefor, on account of the risk which he assumes, which is called a *del credere* commission,—the phrase *del credere* being equivalent to guaranty or warranty. When the factor assumes this contract of guaranty, he does not render himself primarily responsible to the principal, but only secondarily liable, in case of the failure of the buyer to fulfil his contract; and he is entitled to the general rights of a guarantor, as to notice.⁴ But a factor, under a *del credere* commission is only understood to guaranty the payment by the purchaser, and not the safe remittance to the principal.⁵

¹ Hamond v. Holiday, 1 Car. & Payne, 384; White v. Chapman, 1 Stark. R. 113.

² Dodge v. Tileston, 12 Pick. R. 328.

³ Clarke v. Moody, 17 Mass. R. 145.

⁴ Gale v. Comber, 7 Taunt. R. 588; Peale v. Northcote, 7 Taunt. R. 478; Morris v. Cleasby, 4 Maule & Selw. 566; Thompson v. Perkins, 3 Mason, R. 232; 2 Kent, Comm. Lect. 41, p. 624, 625; Holbrook v. Wright, 24 Wend. R. 169. The rule, as stated in Grove v. Dubois, 1 T. R. 112, has been expressly overruled.

⁵ Leveric v. Meigs, 1 Cowen, R. 645; Story on Agency, § 215. But see Mackenzie v. Scott, 6 Bro. Parl. Cas. by Tomlins, 286.

§ 93. In virtue of his special property in goods consigned to his care, a factor may buy and sell in his own name as well as in the name of his principal; and, in such case, if he be the supposed principal, the purchaser will be entitled to the same rights as if he were the real principal. Payment to him by the purchaser will therefore discharge the latter from all liability to the principal.¹ So, also, the purchaser, in such case, may consider the factor as principal, and set off any debt due from the factor to him against the price of the goods.² Yet, if before all the goods are delivered, and before any part of them is paid for, he be informed that they do not belong to the factor, he cannot set them off against a debt due from the factor, in an action against him by the principal.³ Whenever the factor sells in his own name, he may bring an action against the purchaser for the price, and prosecute his remedies in like manner as if he were actually the principal; and he will also be responsible to the purchaser for the performance of his part of the contract;⁴ where, however, the party dealing with a factor, gives exclusive credit to him, he cannot afterwards have recourse to the principal.⁵

§ 94. But although, when the factor contracts in his own name, he is entitled to sue the purchaser personally, and to enforce payment from him, yet his rights in this respect may be superseded by the consignor, and the latter may bring his

¹ Story on Agency, § 112; *Drinkwater v. Goodwin*, Cowp. R. 256; *Johnston v. Usborne*, 11 Adolph. & Ell. 549.

² *Rabone v. Williams*, 7 T. R. 360; *George v. Clagett*, 7 T. R. 359; S. C. 1 Esp. R. 557; *Baring v. Corrie*, 2 Barn. & Ald. 148.

³ *Moore v. Clementson*, 2 Camp. R. 22; *Waring v. Favenc*, 1 Camb. R. 85; *Means v. Henderson*, 1 East, R. 335; *Escott v. Milward*, 7 T. R. 361.

⁴ Story on Agency, § 112; *Drinkwater v. Goodwin*, Cowp. R. 256; *Johnston v. Usborne*, 11 Adolph. & Ell. 549.

⁵ *Patterson v. Gandasequi*, 15 East, R. 62; *Addison v. Gandasequi*, 1 Taunt. R. 514; 2 Kent, Comm. Lect. 41, p. 632.

action directly against the purchaser, although the purchaser dealt with the factor, as owner, in good faith; but, in such case, the purchaser will have the same rights as if he were sued by the factor, and may treat the contract, in all respects, as if the factor were the sole principal.¹ So, also, the principal may call upon the purchaser to pay over the money to him and not to the factor, and if the latter should pay no heed to such requisition, he would render himself liable to the principal.² If, however, exclusive credit be given to the factor, the principal could not interfere. The case of a foreign factor is also an exception to this rule;—as, between himself and the purchaser, he is treated as the sole contracting party, and the principal can neither sue nor be sued upon his contract.³ Another exception to this rule also obtains in cases where the lien or claim of the factor upon the property bought or sold, or its proceeds equals or exceeds the amount or value thereof; and in such a case the rights of the agent are paramount to those of the principal; and if the purchaser, after notice thereof, pay over the purchase-money to the principal, he will be liable therefor to the factor.⁴

§ 95. Where a factor receives instructions, he is bound to

¹ Story on Agency, § 420, and cases cited; *Taintor v. Prendergast*, 3 Hill, R. 72; *Small v. Attwood*, 1 Younge, R. 407, 452; *Leveric v. Meigs*, 1 Cowen, R. 645; *Smith on Merc. Law*, 135; *Stracey v. Decy*, 7 T. R. 361; *George v. Claggett*, 7 T. R. 359; *Warner v. M'Kay*, 1 Mees. & Wels. 595.

² *Lisset v. Reave*, 2 Atk. R. 394; 2 Kent, Comm. Lect. 41, p. 632; *Parker v. Donaldson*, 2 Watts & Serg. 9; *Hogan v. Short*, 29 Wend. R. 458.

³ Story on Agency, 423; *Newcastle, N. C. v. Red River R. R. Co.*, 1 Rob. Louis. R. 145; but see contrà, *Kirkpatrick v. Stainer*, 22 Wend. R. 145.

⁴ *Hudson v. Granger*, 5 Barn. & Ald. 27, 32; Story on Agency, § 408, 424; *Drinkwater v. Goodwin*, Cowp. R. 256; *Paley on Agency*, by Lloyd, 285, 288, 365, 366.

comply with them; and if he sell contrary to the direction of his principal, he renders himself personally responsible for the full amount of the debt.¹ In the absence of express instructions, the powers of the factor depends upon the usage of trade.² A factor may, therefore, sell upon credit, if he be justified by the usage of trade in the particular business in respect to which he is agent. But in a case where such is not the usage of trade, he cannot sell upon credit without an express authority.³ So, also, he cannot allow other than the usual terms of credit. If, therefore, after the usual term of credit has expired, he take a note payable to himself at a future day, he renders himself personally liable.⁴ But, where he complies with the usage, he is not liable, although injury ensue.⁵ Thus, where a factor with orders to sell for cash, sold and delivered the goods, but, according to the usage, did not send in his bill until the next day, before which time the purchaser had become insane and did not pay it, it was held, that the sale was binding on the principal.⁶

¹ *Walker v. Smith*, 4 Dall. R. 389; *Lausatt v. Lippincott*, 6 Serg. & Rawle, 392.

² *Etheridge v. Binney*, 9 Pick. R. 272; *Clark v. Van Northwick*, 1 Pick. R. 343; *West Boylston Manuf. Co. v. Searle*, 15 Pick. R. 225; *Goodenow v. Tyler*, 7 Mass. 36; see cases cited in the succeeding notes; *Dwight v. Whitney*, 15 Pick. 179; *Evans v. Potter*, 2 Gallison, R. 13.

³ *Forrestier v. Bordman*, 1 Story, R. 43; *Greely v. Bartlett*, 1 Greenl. R. 172; *Scott v. Surman*, Willes, R. 400; *Van Alen v. Vanderpool*, 6 Johns. R. 69; *Goodenow v. Tyler*, 8 Mass. R. 36; *Burrill v. Phillips*, 1 Gall. R. 360; *Houghton v. Matthews*, 3 Bos. & Pul. 489.

⁴ *Wiltshire v. Sims*, 1 Camp. N. P. R. 258; *State of Illinois v. Delafield*, 8 Paige, R. 527; S. C. 26 Wend. R. 192; 2 Kent, Comm. Lect. 41, p. 622, 623.

⁵ *Goodenow v. Tyler*, 7 Mass. R. 36; *Greely v. Bartlett*, 1 Greenl. R. 175; *Dwight v. Whitney*, 15 Pick. R. 179; *Tarlton v. McWhorter*, 5 Stew. & Port, 289; *Hapgood v. Batcheller*, 9 Metcalf, R. 573; Story on Contracts, § 354, 3d edition.

⁶ *Clark v. Van Northwick*, R. 343.

§ 96. Where a factor, being duly authorized to sell on credit, takes a promissory note payable to himself, he takes it in trust for his principal, and subject to his order, and he would not be personally liable thereon in the event of the insolvency of the purchaser before payment.¹ If, in such a case, the factor had guaranteed the sale, the principal would nevertheless be entitled to claim the note, or to give notice to the purchaser not to pay it to the factor. So, also, if the factor, in such a case, should fail or die, the note would not pass to his assignees or representatives, but would enure to the benefit of the principal; and if his assignees or representatives should receive payment thereof, or should refuse to surrender it to the principal, they would be personally liable to him.² In such a case, however, if the party purchasing from the factor, did so without knowledge of the principal, he would be discharged by payment to the administrators or representatives of the factor.³ The note would, however, be subject, as we shall see, to the lien of the factor for his commission and expenses.

§ 97. In the next place, the factor has possession of the goods, and a special property therein; and in virtue thereof he has a lien upon them and their proceeds, and the securities given therefor, not only for his expenses and commissions in relation thereto, but for the balance of his general account.⁴

¹ *Messier v. Amory*, 1 Yeates, R. 540; *Goodenow v. Tyler*, 7 Mass. R. 36; *Scott v. Surman*, Willes, R. 400; 2 Kent, Comm. Lect. 41, p. 623; *Titcomb v. Seaver*, 4 Greenl. R. 542; *Edmond v. Caldwell*, 3 Shepley, R. 340; *Hapgood v. Batcheller*, 4 Metcalf, R. 573.

² *De Valengin's Adm's v. Duffy*, 14 Peters, R. 290; *Godfrey v. Furzo*, 3 P. Wms. R. 185; *Ex parte Dumas*, 1 Atk. R. 234; *Tooke v. Hollingsworth*, 5 T. R. 226; *Scott v. Surman*, Willes, R. 400; *Kip v. Bank of N. York*, 10 Johns. R. 53; *Thompson v. Perkins*, 3 Mason, R. 232.

³ *De Valengin's Adm'rs v. Duffy*, 14 Peters, R. 290.

⁴ Story on Agency, § 376, and cases cited; 2 Kent, Comm. Lect. 41, p. 640; *Drinkwater v. Goodwin*, Cowp. R. 251; *Colley v. Merill*, 6 Greenl. R. 50; *Brander v. Phillips*, 16 Peters, R. 129; *Foxcroft v. Devonshire*,

In this respect, usage has enlarged his rights beyond what is generally allowed to agents, in as far as the ordinary lien of an agent is a particular lien, but his is a general lien. Again, he has a lien for all liabilities fairly incurred by him in the course of his agency, whether they be by advances and payment, or by losses, or, by guaranty, or otherwise.¹ So, also, his lien for any advances or liabilities, which he may have incurred in respect to goods, attaches not only to those in his possession, but to those which are on their way to him at the death of the consignor.² So, also, when he has sold the goods, his lien will attach to the price in the hands of the purchaser, and he may, in so far, insist upon payment thereof to him, instead of the principal; and if his lien exceed or equal in amount the price, he may prevent the purchaser from paying any portion of it to the principal.³ But to entitle himself to this latter lien, he is bound to give notice to the purchaser not to make payment to the principal.⁴ His lien is, however, strictly confined to debts created in the course of the agency.⁵

§ 98. Where a factor makes advances, or incurs liabilities, upon a consignment of goods, he may sell them, in the exercise of a sound discretion, and according to the general usage, and

2 Burr. R. 931; *Houghton v. Matthews*, 3 Bos. & Pul. 485; *Stevens v. Robins*, 12 Mass. R. 182; *Olive v. Smith*, 5 Taunt. R. 56; *Walker v. Birch*, 6 T. R. 258; *Weymouth v. Boyer*, 1 Ves. jr. 416; *Hammond v. Barclay*, 2 East, R. 227; *Kruger v. Wilcox*, Ambl. R. 252; *Godin v. London Ass. Co.* 1 Burr. R. 494.

¹ Ibid.; *Bryce v. Brooks*, 26 Wend. R. 367.

² Story on Agency, § 377; *Hammond v. Barclay*, 2 East, R. 227; *Paley on Agency*, by Lloyd, 140.

³ Story on Agency, § 407; *Drinkwater v. Goodwin*, Cowp. R. 251, 255; *Hudson v. Granger*, 5 Barn. & Ald. 27, 32, 34; Ante, § 96.

⁴ *Drinkwater v. Goodwin*, Cowp. R. 251; *Coppin v. Walker*, 7 Taunt. R. 237; *Coppin v. Craig*, 7 Taunt. R. 243; *Atkins v. Amber*, 2 Esp. R. 493; 3 Chitty on Comm. & Man. 211; Story on Agency, § 407.

⁵ Ibid.

reimburse himself for all expenses and liabilities out of the proceeds of the sale ; and the consignor cannot interfere, unless there be some existing arrangement between himself and the factor, which controls or varies this right.¹ Thus, if contemporaneously with the consignment, and with the advances and liabilities, orders be given by the consignor, which are assented to by the factor, that the goods shall not be sold until a certain fixed time, the factor is bound by such agreement, and cannot sell even to reimburse himself for his liabilities and advances, until such time has elapsed.² So, also, if orders be transmitted not to sell under a fixed price, and they are assented to, the factor cannot sell to reimburse himself for his liabilities and advances, unless, after due notice, the consignor refuse to provide any other means to reimburse the factor ;³ and if he do sell, without notice or demand, he will be liable to the consignor for damages.⁴ And, indeed, in no case can the factor sell contrary to orders, so long as the consignor stands ready to discharge his advances and liabilities.⁵ But where a consignment is made

¹ *Brander v. Phillips*, 16 Peters, R. 129 ; *Brown v. M'Gran*, 14 Peters, R. 479.

² *Pothonier v. Dawson*, 1 Holt, R. 383 ; *Graham v. Dyster*, 6 Maule & Selw. 1, 4, 5 ; *Brown v. M'Gran*, 14 Peters, R. 495 ; *Blot v. Borceau*, Sandf. Sup. C. R. 111 ; *Smart v. Sandars*, 3 Common Bench R. 380 ; *Marfield v. Douglas*, 1 Sandf. Sup. C. R. 360. But see *Parker v. Brancker*, 22 Pick. R. 46, in which a relaxation of this rule was held to obtain in favor of cases where, by reason of an untoward state of the market, the just expectations of both parties had been defeated ; in which case, the factor was held to be empowered to sell, after a demand on his principal of repayment and his neglect to repay.

³ *Parker v. Brancker*, 22 Pick. R. 46 ; *Brown v. M'Gran*, 14 Peters, R. 495 ; *Tucker v. Wilson*, 1 P. Wms. R. 261 ; *Lockwood v. Ewer*, 2 Atk. R. 303 ; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 100 ; *Frothingham v. Everton*, 12 N. H. 239.

⁴ *Frothingham v. Everton*, 12 N. Hamp. R. 239 ; *Parker v. Brancker*, 22 Pick. R. 40.

⁵ *Brown & Co. v. M'Gran*, 14 Peters, R. 495 ; *Pothonier v. Dawson*, Holt, R. 383 ; *Graham v. Dyster*, 6 Maule & Selw. 1, 4, 5. The English

without specific orders as to time and mode of sale, and the factor incurs liabilities and makes advances, the consignor cannot, by subsequent orders given after the liabilities are incurred, or the advances are made, suspend or control the factor's right of sale for the purpose of reimbursing himself therefor, except so far as respects the surplus of the consignment, not necessary to cover the liabilities and advances.¹ This right of the factor would especially obtain in cases where the consignor becomes insolvent, and where, therefore, the consignment constitutes the only fund for indemnity.²

doctrine goes further than this, and denies to the factor the right to sell contrary to his principal's orders, although the latter neglect, on request, to repay his advances. *Smart v. Sandars*, 3 Man. Grang. & Scott, 380, S. C. 5 Ib. 894.

¹ Ibid. *Marfield v. Douglass*, 1 Sandf. Sup. Ct. R. 360.

² Ibid. The same general rules as to the duties and powers of a factor are laid down in the Code de Commerce of Holland, articles 80–83, from which we quote the following passage, translated by authority from the Dutch original: “Le commissionnaire (art. 80,) pour toutes les actions qu'il aurait à exercer contre son commettant, tant pour le remboursement de ses avances, intérêts et frais, *que pour les obligations courantes qu'il a contractées pour lui*,* aura un privilège sur la valeur des marchandises ou effets que le commettant lui a expédiés de l'étranger pour être vendus pour son compte, s'ils se trouvent à sa disposition dans ses magasins ou dans un dépôt public, ou s'ils se trouvent en sa possession de quelque autre manière, ou si, avant leur arrivée, il peut constater l'expédition qui lui en a été faite par un connaissement ou par une lettre de voiture.” “Le même privilège (art. 81) appartient au commissionnaire auquel ont été envoyés des marchandises ou effets dans le même but, d'un autre lieu situé dans l'intérieur du royaume, mais seulement et exclusivement pour ses avances, intérêts et frais, ou pour les obligations qu'il a contractées par rapport aux marchandises ou effets sur lesquels il veut exercer son privilège.” “Si les marchandises ou effets (art. 82) ont été vendus et livrés pour le compte du commettant, le commissionnaire se remboursera sur le produit de la vente du montant de ses avances, intérêts et frais, par préférence aux autres créanciers du commettant.” “Si le commettant (art. 83) a envoyé de l'étranger au commissionnaire des

* This power, which is in the nature of a general lien, is not given by the corresponding article of the French Code de Commerce (No. 93,) or by any of the excellent dispositions of the Spanish code with respect to the rights and liabilities of factors.

§ 98 *a*. But where goods have been consigned to a factor for sale, the transaction would seem to import an obligation on the part of the consignor to give a reasonable credit, so far as concerns a sale of the goods, for all advances made thereon by him, even although the consignment were made without stipulations as to price, time, or mode of sale.¹ If, therefore, he should proceed to sell the goods at once, so as to sacrifice the interests of the consignor, without previous demand of payment for his advances, he would expose himself to a claim for damages.² But he is only bound to wait a reasonable time, and he may then proceed to sell, in the exercise of a sound discretion and in good faith, without demanding repayment of his advances by the principal, or notifying to him an intention to sell.³ Yet the consignor is not bound to wait until the sale of the goods, or to depend thereon solely for his advances, but may immediately maintain an action therefor, unless there be an agreement to the contrary.⁴

marchandises ou effets, avec ordre de les tenir en dépôt à sa disposition, ou bien s'il a limité son pouvoir de les vendre, et si le premier est resté en demeure de satisfaire aux obligations pour lesquelles il est accordé un privilège aux termes de l'art. 80, le commissionnaire pourra, sur la production des preuves nécessaires, et sur une simple requête, obtenir du tribunal d'arrondissement de son domicile, de faire vendre les marchandises ou effets sur lesquels il est privilégié, en vente publique, ou par deux courtiers nommés par le tribunal, suivant le cours de la bourse ou du marché ; et cela soit en totalité, soit en telle partie que le juge ordonnera, selon le montant de la dette." *

¹ Upham *v.* Lefavour, 11 Metcalf, R. 183 ; Frothingham *v.* Everton, 12 N. Hamp. R. 239.

² Ibid.

³ Marfield *v.* Douglass, 1 Sandf. S. C. R. 360. This doctrine does not, however, obtain in England. See Smart *v.* Sandars, 5 Man., Grang. & Scott, 894.

⁴ Beckwith *v.* Sibley, 11 Pick. R. 482.

* No such power is given the French code ; and the Spanish code (Art. 127) says, absolutely and without exception, "El comisionario debe sujetarse en el desempeño de su cargo, cualquiera sea la naturaleza de este, á las instrucciones que haya recibido de su comitente." And the language of art. 129 is still stronger : "Pero en ningun caso podrá obrar el comisionista contra la disposicion aspesa de su comitente."

§ 98 *b*. When the factor is expressly ordered not to sell at all, and he violates his instructions, the damages would be the difference between the actual price received, and the highest price the article bore in the market between the reception of the instructions and the commencement of the suit; provided the suit be commenced within a reasonable period after the transaction.¹ But where he is ordered to sell at a fixed price, and he violates his instructions, the measure of damages would be the difference between the price obtained on the sale and the minimum price limited by his instructions.²

§ 99. If, however, no advances have been made, and no liabilities incurred by the factor, he is bound to obey the exact orders of the consignor, and the consignor has a right to control the sale according to his pleasure from time to time.³

§ 100. A factor is bound, unless in the excepted case before mentioned, where advances have been made, to obey the orders of his consignor exactly, if they be imperative and not discretionary; and he is liable for any injury resulting from a breach of orders, however proper his motives may have been.⁴ Thus, where a merchant in Philadelphia sent to his correspondent at Bordeaux a cargo of coffee, with orders to "make sale of the coffee immediately on arrival, and forward the returns in the articles mentioned below, in the same vessel," it was held, that the agent was bound to sell immediately on the arrival of the cargo, and that he had no right to exercise any discretion in

¹ *Marfield v. Douglass*, 1 Sandf. S. C. R. 360.

² *Blôt v. Boiceau*, 1 Sandf. S. C. R. 111; *Frothingham v. Everton*, 12 N. Hamp. R. 239.

³ *Brown v. M'Gran*, 14 Peters, R. 495; *Courcier v. Ritter*, 4 Wash. C. R. 559; *Manella v. Barry*, 3 Cranch, R. 415.

⁴ *Manella v. Barry*, 3 Cranch, R. 415; *Courcier v. Ritter*, 4 Wash. C. R. 559; *Short v. Skipwith*, 1 Brock. C. C. R. 103; *Marfield v. Douglass*, 1 Sandf. S. C. R. 360.

respect to whether the sale was advisable or not.¹ Where, however, the agent acts only under general instructions, and has discretionary power, he is bound to exercise reasonable care and prudence, to do what is for the interest of his principal. And if injury result from his want of ordinary diligence, he will be responsible, although he may have neither been guilty of fraud, nor of such gross negligence as to carry with it the insignia of fraud.² The general measure of diligence, required of a factor as to his consignments, is ordinary diligence, and he is bound to exercise as much care and attention in relation thereto, as to his own private property.³ It is not necessary in all cases, that the consignor should give an order in the form of a command, in order to make it the duty of the factor to obey it; for, in the case of a simple consignment of goods, without any interest therein on the part of the consignee, or any advance or liability incurred thereon, the expression of a wish by the consignor may fairly be presumed to be an order;⁴ and any answer by the factor to the effect that he had noted the wish, would be construed to be an assent thereto.⁵ But where advances have been made, and liabilities incurred, in respect of any consignment, the factor has a lien thereupon, and may, therefore, refuse to obey subsequent orders, which would destroy his lien, unless the consignor give him other security, or be willing to pay him therefor. But if he have received the goods subject to certain orders, he is bound to observe those orders, unless, after reasonable notice, the consignor refuses or neglects to indemnify him for his advances.⁶ He cannot, however, re-

¹ *Courcier v. Ritter*, 4 Wash. C. C. R. 559.

² *Burrill v. Phillips*, 1 Gallison, C. C. R. 360; *Evans v. Potter*, 2 Gallison, R. 13; *Porter v. Blood*, 4 Pick. R. 54; *Marfield v. Douglass*, 1 Sandf. S. C. R. 360.

³ *Ibid.*; Post, § 102; *Brown v. Arrott*, 6 Watts & Serg. 402.

⁴ *Brown v. M'Gran*, 14 Peters, R. 494.

⁵ *Ibid.*

⁶ Ante, § 98; *Jolly v. Blanchard*, 1 Wash. C. C. R. 252; *Parker v.*

tain more than sufficient to indemnify him ; and if he retain the whole, contrary to orders, because of a lien for a small amount, he will be responsible.¹

§ 101. Where general authority is given to a factor to buy and sell, he is considered as a general agent, and his acts will be binding on his principal, whether he have violated his private instructions or not.² So, also, factors employed to do certain acts, have incidental authority to bind their principal, by any acts conducing to the proper performance of their duty.³ Thus, if a factor be employed to ship goods for his principal, he is authorized to bind the latter to the payment of freight.

§ 102. A factor is bound to keep the goods intrusted to him, with the same care as a prudent man would bestow upon them, if they were his own.

§ 102 *a*. A factor is bound to give the unbiased use of his discretion and judgment to his principal, to keep the property of his principal unmixed with that belonging to others, — to keep and render true accounts, and to keep his principal informed of all facts material to his interests ;⁴ if loss occur through neglect of these duties, the factor becomes personally responsible. The measure of his diligence is ordinary diligence.⁵ He is not, therefore, liable for unavoidable accidents, happening without his default ; such as robbery or fire ; but if the loss accrue

Brancker, 22 Pick. R. 40 ; Williams v. Littlefield, 12 Wend. R. 362, 370 ; Holbrook v. Wright, 24 Wend. R. 169 ; Story on Agency, § 374.

¹ Jolly v. Blanchard, 1 Wash. C. C. R. 252.

² Story on Agency, § 110 ; 2 Kent, Comm. Lect. 41, p. 619, 620.

³ Story on Agency, § 110 ; Paley on Agency, by Lloyd, 241 ; Lausatt v. Lippincott, 6 Serg. & Rawle, 386 ; Cochran v. Irlam, 2 Maule & Selw. 301, note, 303.

⁴ Clarke v. Tipping, 9 Beavan, R. 294 ; Brown v. Arrott, 6 Watts & Serg. 402.

⁵ Evans v. Potter, 2 Gall. R. 13.

through his gross negligence, or unreasonable want of care, he will be responsible. The question has been much discussed, as to his duties and authority, in regard to insuring the goods consigned to him, and it now seems to be settled, that he has authority to insure them, not only to the extent of his own interest, but also in behalf of his principal.¹ Whether, if he be a mere naked consignee to take possession of the goods with no power to sell, he would have a right to insure, is more questionable, and does not seem yet to have been directly adjudicated.² As to his duty in respect of insurance, it seems also to be settled, that he is only bound to insure, in case he has either received express orders so to do, or, in case such an order is to be implied from a previous course of dealing between the parties, or, from the usage of trade.³ Where such an order is either expressly or impliedly given, he will be responsible for any damage or loss, which may result from his neglect to insure. And where it is his duty to insure, he is bound to give notice to his principal, in case of his inability to procure insurance.⁴ He may insure in his own name, or, in the name of the principal; and if he elect the former, he may, in case of loss, recover of the underwriters the whole amount of the value of the property insured; and the surplus, beyond his own interest, will be a resulting trust for the benefit of his principal.⁵

¹ Story on Agency, § 111.

² Story on Agency, § 111; *Wolfe v. Horncastle*, 1 Bos. & Pul. 323; *Lucena v. Crawford*, 3 Bos. & Pul. 98; 5 Bos. & Pul. 324; *Cornwall v. Wilson*, 1 Ves. R. 509. See, also, particularly, *De Forest v. The Fulton Ins. Co.* 1 Hall, R. 84, 100 to 136.

³ Story on Agency, § 111; *Smith on Merc. Law*, 97; *Smith v. Lascelles*, 2 T. R. 189; *Crawford v. Hunter*, 8 T. R. 13; *French v. Backhouse*, 5 Burr. R. 2727; *Morris v. Summerl*, 1 Cond. Marsh. on Ins. 301, and note; *Randolph v. Ware*, 3 Cranch, R. 503; *Columbian Ins. Co. v. Lawrence*, 2 Peters, R. 49; *Smith v. Cadogan*, 2 T. R. 188; *Wallace v. Telfayer*, 2 T. R. 188, notes.

⁴ *Callendar v. Olerich*, 5 Bing. N. C. 63.

⁵ Story on Agency, § 111, 272, 394.

§ 103. In the next place a factor cannot delegate his office to another, because it is an office of personal trust ; unless, with the express authority of his principal, or with his implied authority arising from some usage in the trade, or from the particular circumstances of the case.¹ He cannot send a way to another person, the goods consigned to him for sale at a particular place, although he is unable to sell them there.² But whenever a right to delegate his authority is necessarily implied in his orders, he may exercise such right ; as, if he be ordered to recover a debt, he is authorized to employ proper legal agents.³ So, also, he cannot, unless specially authorized, barter the goods of his principal.⁴

§ 104. So, also, it is now settled, although it was for a long time a subject of doubt, that a factor cannot pledge the goods of his principal for his own debts and liabilities, even though a bill of parcels and a receipt be given ; and if he do, the principal is entitled to recover them from the person to whom they are pledged.⁵ So strictly is this rule applied, that it has been held, that, although there should be a request of the consignor accompanying the consignment, that his factor should make remittances in anticipation of sales, yet, that the factor would

¹ *Catlin v. Ball*, 4 Camp. R. 183 ; *Solly v. Rathbone*, 2 Maule & Selw. 298, a ; *Story on Agency*, § 34 a ; *Cochran v. Irlam*, 2 Maule. & Selw. 301, n ; *Pothier, Pand. Lib. 11, tit. 1, n. 2, 3* ; *Henderson v. Barnwell*, 1 Younge & Jerv. R. 387.

² *Catlin v. Bell*, 4 Camp. R. 183.

³ 1 Bell, Comm. p. 482. (5th ed.)

⁴ *Guerreiro v. Peile*, 3 Barn. & Ald. 616 ; *Story on Agency*, § 113 ; 2 Kent, Comm. Lect. 41, p. 625 ; *Rodriguez v. Heffernan*, 5 Johns. Ch. R. 429.

⁵ *Story on Agency*, § 113 ; 2 Kent, Comm. Lect. 41, p. 625 - 628 ; *Martini v. Coles*, 1 Maule & Selw. 140 ; *Shipley v. Kymer*, 1 Maule & Selw. 484 ; *Graham v. Dyster*, 6 Maule & Selw. 1 ; *Queiroz v. Trueman*, 3 Barn. & Cres. 302 ; *Van Amringe v. Peabody*, 1 Mason, R. 440 ; *Patterson v. Tash*, 2 Strange, R. 1178 ; *Newsome v. Thornton*, 6 East, R. 17 ; *Urquhart v. McIver*, 4 Johns. R. 103 ; *Boyson v. Coles*, 6 Maule & Selw. 14.

not be thereby authorized to pledge the goods in order to raise money to remit.¹ Nor can he pledge by the indorsement and delivery of a bill of lading, any more than by the delivery of the goods themselves.² Indeed, the rule is that the factor cannot pledge; and the ground of it is stated to be, that if the pawnee will call for the letter of advice, or make due inquiry, as to the source from which the goods came, he can discover, that the possessor holds the goods as factor, and not as vendee, and he is bound to know the extent of the factor's power at his own peril.³

¹ *Queiroz v. Trueman*, 3 Barn. & Cres. 342.

² *Martini v. Coles*, 1 Maule & Selw. 140; *Shipley v. Kymer*, 1 Maule & Selw. 484; *Graham v. Dyster*, 6 Maule & Selw. 1.

³ 2 Kent, Comm. Lect. 41, p. 626; *Patterson v. Tash*, 2 Strange, R. 1178; *Daubigny v. Duval*, 5 T. R. 604; *De Bouchout v. Goldsmid*, 5 Ves. R. 211; *McCombie v. Davies*, 7 East, R. 5; *Martini v. Coles*, 1 Maule & Selw. 140; *Fielding v. Kymer*, 2 Brod. & Bing. 639. This rule, however well settled it may be, does not seem to have met with full approbation. It originated in a nisi prius decision by Ch. Justice Lee, in the case of *Patterson v. Tash*, 2 Strange, R. 1178, the report of which case has been said to be inaccurate. It is opposed to the doctrine of the Scottish Law, (1 Bell, Comm. p. 483-488, 5th ed.,) and to the modern rule, which now obtains generally on the Continent of Europe. The rule of the Civil Law, "*Nemo plus juris ad alium transferre potest quam ipse haberet*," under which the general power to pledge was denied, although it was affirmed at first in France, Holland, and Italy, (*Basnage Trait. des Hypotheques*, p. 4 & 6; *Pothier, Trait. des. Cont. de Nantissement*, No. 27, Vol. 2, p. 953; *Van Leewin Censura forensis Theoretico-Practica*, Lib. 4, cap. 7, § 17, p. 472; *Averranus Interp. Juris*, Lib. 4 c. 22, § 13, *et seq.*; *Rot. Genuæ de Mercatura &c.*, *Decisiones*, No. 199,) seems to have been relaxed, so as to enable the possessors of movables, and those having the ostensible right of property in goods, to pledge them. (See 1 Bell, Comm. p. 485, and note, 5th ed.; *Groenewegen, Tract. de Leg. Abrogatis*, in *Hollandia*, p. 56; *Casareg. Dissert.* 76, No. 4; *Casareg. Il Cambisti Istruito*, c. 3, No. 43; *Ansaldus De Commercio et Merc.* p. 351, edit. 1751, § 41, *et seq.*) See, also, the Report of the Select Committee of Parliament on the Laws relating to merchants, agents, or factors, &c., p. 20, in which this opposite doctrine from that which was affirmed by Mr. Ch. J. Lee, is stated to "be the law of

§ 105. But although a factor cannot pledge the goods of his principal as his own, yet, if he have a lien thereupon, he may deliver them to a third person, with notice of his lien, and with a declaration, that the transfer is to such person, as agent of the factor, and for his benefit; for this is in effect a continuance of the factor's possession, and does not divest him of his right.¹ So, also, a factor, having goods consigned to him for sale, may put them in the hands of a commission merchant, connected with an auctioneer in business, to be sold, and the auctioneer may safely make an advance on the goods, for purposes connected with the sale, and as part payment in advance, or in anticipation of the sale, if such be the custom and ordi-

France, Portugal, Spain, Sardinia, Italy, Austria, Holland, the Hanse towns, Prussia, Denmark, Sweden, and Russia." The English doctrine, as stated by Mr. Ch. J. Lee, was at first shaken by the decision of Lord Mansfield, in *Pultney v. Keymer*, 3 Esp. R. 182; but this case was, in its turn, overruled by *Solly v. Rathbone*, 2 M. & Selw. 298; and *Shipley v. Kymer*, 1 Maule & Selw. 484; *Martini v. Coles*, 1 Maule & Selw. 140; and *Boyson v. Coles*, 6 M. & S. 14; and *Daubigny v. Duval*, 5 T. R. 604, by which it was settled. Its injurious effects, however, were so manifest, that the House of Commons instituted a Committee of Inquiry into the law and practice of foreign nations, and of England, in respect thereto, which, after long investigation, reported in favor of removing this restriction as to the right of pledging by factors. The result was, that the statute of 6 Geo. 4, ch. 94, and 7 & 8 Geo. 4, ch. 29, was passed, authorizing a factor to pledge to a certain extent the goods of his principal. An additional statute has also been passed in respect to this subject, (5 & 6 Victoria, ch. 39.) Several of the American States have followed the example of England, and enacted statutes on the basis of the English statutes; and particularly, Rhode Island, New York, and Pennsylvania. See the Civil Code of Louisiana, Art. 3214. See 2 Kent, Comm. Lect. 41, p. 629, note; Bell, Comm. Vol. 1, p. 485 to 488, (5th ed.); Story on Agency, § 113, and notes. See, also, *Williams v. Barton*, 3 Bing. R. 139; *Jennings v. Merrill*, 20 Wend. R. 1; *Purdon's Dig.* 402; *Evans v. Potter*, 2 Gall. R. 14; The Factors' Acts of 4 & 6 Geo. 4, and of 5 & 6 Victoria, are set forth in Smith on Merc. Law, p. 112 to 121.

¹ *Urquhart v. McIver*, 4 Johns. R. 103; *McCombie v. Davies*, 7 East, R. 5.

nary usage in such cases.¹ But if the factor, in such a case, should place the goods in the hands of the auctioneer for any other purpose than that of sale, and he should advance money on them as a pledge, the transaction would be invalid.²

§ 106. A factor may, however, pledge negotiable paper as a security for his own debt, and thereby bind his principal, unless the latter can charge the party receiving it with notice of the fraud, or of the want of title; for, from reasons of public policy, the mere possession of negotiable paper, carries with it an imperative presumption of title and power of disposal.³ So, also, factors may pledge the goods of their principal for the payment of the duties and other charges due thereon, and for advances lawfully made on account of their principal, and for any other charges and purposes, which are allowed and justified by the usage of trade.⁴ Of course, if he be expressly authorized to pledge the goods, he may exercise such power. But what circumstances are sufficient to raise an implied power, does not seem to be clearly settled.

¹ *Lausatt v. Lippincott*, 6 Serg. & Rawle, R. 386.

² *Martini v. Coles*, 1 Maule & Selw. 140.

³ *Collins v. Martin*, 1 Bos. & Pul. 548; *Treuttel v. Barandon*, 8 Taunt. R. 100.

⁴ *Evans v. Potter*, 2 Gallison, R. 13; *Lausatt v. Lippincott*, 6 Serg. & Rawle, 386. This doctrine is so laid down in *Story on Agency*, § 113. See also note 2. Mr. Justice Story says: "This I conceive to be the true doctrine, notwithstanding the language used in some of the authorities. The case of *Pultney v. Keymer*, 3 Esp. R. 182, may be deemed overruled by the later cases, and especially by the cases of *Shipley v. Kymer*, 1 M. & Selw. 484; *Solly v. Rathbone*, 2 M. & Selw. 298; *Cockran v. Irlam*, 2 M. & Selw. 201; *Martini v. Coles*, 1 M. & Selw. 140, and *Boyson v. Coles*, 6 M. & Selw. 14, as to the point of advances made to an agent on his own account. See also *Daubigny v. Duval*, 5 T. R. 604; *Queiroz v. Freeman*, 3 B. & Cresw. 342; *Mark v. Bowers*, 16 Martin, R. 95. In *Martini v. Coles*, 1 M. & Selw. 140, Lord Ellenborough and Mr. Justice Le Blanc recognized the right to pledge for advances and charges on account of the principal. The cases

§ 107. If a factor take a security payable to himself from a purchaser of goods, and give his own security to his principal, without giving the name of the purchaser, the factor cannot compel his principal to refund the money paid him, on failure of payment by the purchaser.¹ For he thereby induces the principal to trust to the security, and assures him of the solvency of the purchaser.

§ 108. 4th. *Ships' Husbands*. — A ship's husband is a person employed by the owner of the ship to superintend all matters relating to the repairs, equipments, management, and other concerns of the ship. His duties and powers are frequently defined by special agreement. When they are not, he is gene-

of *Solly v. Rathbone*, 2 M. & Selw. 298, and *Cockran v. Irlam*, 2 M. & Selw. 301, note, do, it must be admitted, seem to overturn the authority of *Pultney v. Keymer*, 3 Esp. R. 182, as to the point of advances and charges made on account of the principal. But in each of those cases, there was this ingredient, that it was not the case of a mere pledge for advances and charges on account of the principal, but a delegation also of authority to the pledgee, as sub-agent or co-agent, to sell the goods which was held to be tortious; as an agent could not delegate his authority. *Pro tanto*, no doubt, the authority was void. But why should the pledge be held void, as to advances and charges made for the principal? The ground seems to have been (whether it be satisfactory or not,) that the sale by the pledgee, as co-agent, or sub-agent, made the whole proceeding tortious *ab initio*. That doctrine would not apply to a mere pledge for advances and charges required to be made for the principal, where the original agent still retained his general authority. This whole subject is very accurately and clearly discussed, and the results stated, in Mr. Chancellor Kent's learned Commentaries. 2 Kent, Comm. Lect. 41, p. 625 to 628, (4th edit.) What circumstances will or will not amount to an implied authority to an agent, from whom advances are asked, to make a pledge for such advances, is a matter upon which the authorities leave much doubt; and especially the cases of *Graham v. Dyster*, 2 Stark. R. 21, and *Queiroz v. Freeman*, 3 B. & Cresw. 342, and *Laussatt v. Lippincott*, 6 Serg. & R. 386; *Newbold v. Wright*, 4 Rawle, R. 195."

¹ *Simpson v. Swan*, 3 Camp. R. 291; *Lefevre v. Lloyd*, 5 Taunt. R. 749; *Goupy v. Harden*, 7 Taunt. R. 159.

rally bound to see that the ship is properly repaired, equipped, and manned ; to procure freights or charter-parties ; to preserve the ship's papers ; to make the necessary entries, and to adjust freight and averages ; to disburse and receive moneys ; to keep and make up the accounts as between all the parties interested ; to see to the due furnishing of provisions and stores ; and to settle all the contracts with creditors for furnishings.¹ Without special powers, he cannot, however, borrow money generally for the use of the ship ; nor take bills for the freight, and give up possession and lien over the cargo ; nor insure, so as to bind the owners for the premium.² He has a lien for all expenses and disbursements made by him as agent ;³ and his duties and liabilities are generally those of a general agent.

§ 109. 5th. *Masters of Ships*. — The master of a ship has a general authority, growing out of his official relation to the ship, to make all contracts incidental to her ordinary employment. He may hire seamen for the voyage ; he may let the ship on a charter-party, or take shipments on freight, if such be her usual employment, and not otherwise ; he may contract for necessary repairs and equipments for the voyage, — unless a ship's husband be employed, who is known to the party contracting with the master ; he may hypothecate the ship in foreign ports for money advanced to supply its necessities, if they cannot be otherwise supplied ; or he may, under certain circumstances, sell the ship and cargo. He is sometimes, also, appointed supercargo, or consignee of the cargo ; in which

¹ Abbott on Ship. (Shee's ed.) p. 92 ; Story on Agency, § 35 ; 1 Bell, Comm. 503 to 504 (5th ed.) ; French v. Backhouse, 5 Burr. R. 2727 ; Sims v. Brittain, 4 Barn. & Adolph. 375 ; English Law Magazine, Art. Mercantile Law, No. 13.

² 1 Bell, Comm. 503 to 505, (5th edit.) ; Abbott on Ship. (Shee's ed.) p. 92 ; Beawes, Lex Merc. 47.

³ Holderness v. Shackles, 8 Barn. & Cres. 612.

case, he is not only the agent of the owners of the ship, but also of the consignors; and in his latter capacity is a factor. If the owner of a ship and the consignor be the same person, the master is liable to him in two characters, which are carefully to be distinguished. During the voyage, he acts as master; but after the cargo has arrived at its destination, he is generally treated as acting solely in the capacity of consignee.¹ Under ordinary circumstances, the master, in his official capacity, has no other relation to the cargo than that of carrier; but in cases of extreme emergency and necessity, he becomes a consignee and supercargo by the mere effect of law, for the purpose of jettison and of sale.

§ 110. In the present connection, we have only to do with his rights, duties, and liabilities in respect of contracts of sale, whether they be for furnishings to the vessel, or for the sale of the vessel and cargo.

§ 111. And here it is proper first to state, that although a master of a ship cannot generally delegate his authority to another person; yet this rule does not restrain him with the same force that it does agents in general. In cases of emergency or necessity, in a foreign port, in the absence of the owner or employer, he is invested with power to delegate his authority as master, whenever it may be necessary or proper for the welfare of the ship, or the accomplishment of the voyage.²

¹ Curtis on Merchant Seamen, p. 207; Story on Agency, § 36; Williams v. Nichols, 13 Wend. R. 58; Kendrick v. Delafield, 2 Caines, R. 67; Earle v. Rowcroft, 8 East, R. 126; The Vrow Judith, 1 Rob. Adm. R. 150; The St. Nicholas, 1 Wheat. R. 417; Abbott on Ship. Part. 2, ch. 4, § 1, n. 1.

² 1 Domat, B. 1, tit. 16, § 3, art. 3; 1 Bell, Comm. 505 to 508, 5th ed.; Story on Agency, § 36; Dig. Lib. 11, tit. 1, c. 1, § 5; Pothier, Pand. Lib. 14, tit. 1, n. 3.

§ 112. And, in the first place, the master may contract for the purchase of the equipments and furnishings of the vessel. In this respect, the usage of trade has invested him with all the powers of a general agent, and his relation to the ship creates so strong a presumption of his authority, that special notice of the contrary would be required to overcome it.¹ If, however, a ship's husband be employed, the procurement of equipments and necessities would be properly his duty, and no person, knowing such a fact, would be authorized to contract with the master in respect thereto.² So, also, the master may borrow money for the purpose of procuring necessities for the ship, and the owners will be liable therefor, if the circumstances of the case fairly justified him, whether the ship be in a foreign port or not.³

§ 113. If exclusive credit be given to the master, he alone is liable.⁴ But if credit also be given to the owners, the presumption in favor of the master's authority to contract, only extends to necessities for the ship. The term *necessaries* is not, however, to be construed according to its literal import, but is understood to embrace all things which are suitable and proper, and which the ship might reasonably be supposed by a

¹ Story on Agency, § 119 ; 1 Bell, Comm. p. 506, 507, (5th ed.) ; Abbott on Ship. Part. 2, ch. 2, § 1 to 11 ; 3 Kent, Comm. Lect. 46, p. 158 to 176 ; James v. Bixby, 11 Mass. R. 34 ; 1 Livermore on Agency, 157, 158, (edit. 1818.)

² 1 Bell, Comm. 413 ; Marquand v. Webb. 16 Johns. R. 59 ; Schermerhorn v. Loines, 7 Johns. R. 311 ; Muldon v. Whitlock, 1 Cowen, R. 290 ; Ex parte Bland, 2 Rose, R. 91.

³ Hussey v. Allen, 6 Mass. R. 163 ; James v. Bixby, 11 Mass. R. 34 ; Wainwright v. Crawford, 4 Dall. R. 225 ; Millward v. Hallet, 2 Caines, R. 77 ; Webster v. Seekamp, 4 Barn. & Ald. 352 ; Stewart v. Hall, 2 Dow, R. 29 ; The Brig Sarah Ann, 2 Sumner, R. 215 ; New England Ins. Co. v. The Brig Sarah Ann, 13 Peters, R. 387.

⁴ Thorn v. Hicks, 7 Cowen, R. 697.

prudent owner to need.¹ If, therefore, the party contracting with the master furnish goods not proper, he can only look to the master for payment; and it is for him to prove, that the articles furnished were fit and proper.² But if credit be given to both parties, and the goods furnished be fit and proper, the person supplying them may look to both parties. So, also, if no credit be given to the master, he is not personally liable;³ but he will be always personally bound, unless he expressly confine the credit to owners of the ship.⁴ The only question in all these cases, by which the liability of either or both parties is determined, is to whom the credit was given.⁵

§ 114. In the next place, the master is, in cases of great emergency or necessity, invested, by operation of law, with authority to sell the ship and cargo. Where the master has met with severe accidents, by which the vessel is crippled and unable to perform her voyage, the master is bound, in the first place, to repair her, if she is worth repairing; and for this purpose, he must first apply all his personal funds on board, and then he may raise money upon the personal credit of the owner, and of the ship, and, if necessary, by bottomry.⁶ But if the

¹ *Webster v. Seekamp*, 4 Barn. & Ald. 354; *Rosher v. Busher*, 1 Stark. R. 27.

² *Abbott on Ship*. (Story's ed.) 106, and note by Mr. Justice Story; *Cary v. White*, 1 Bro. Parl. Cas. 284.

³ *Farmer v. Davies*, 1 T. R. 108; *Hoskins v. Stagton*, Cas. Temp. Hard. 376.

⁴ *Rich v. Coe*, Cowp. R. 636; *Abbott on Ship*. Part 2, ch. 3, p. 115.

⁵ *Harrington v. Fry*, 2 Bing. R. 181.

⁶ *The Nelson*, 1 Haggard, Adm. R. 169; *The Zodiac*, 1 Haggard, Adm. R. 320; *The Rhadamanthe*, 1 Dodson, Adm. R. 201; *The Augusta*, 1 Dodson, Adm. R. 283; *The Sydney Cove*, 2 Dodson, Adm. R. 11; *The Virgin*, 8 Peters, R. 538; *The Aurora*, 1 Wheat. R. 96; *Murray v. Lazarus*, 1 Payne, R. 572; *The Fortitude*, 3 Sumner, R. 228; *The brig Hunter*, Ware, R. 249; *The Reliance*, 3 Haggard, Adm. R. 56; *The Packet*, 3 Mason, R. 225; *The Tartar*, 1 Haggard, Adm. R. 1; *Pope v. Nickerson*, 3 Story, R.

vessel be not worth repairing, and the expense of repairing would be ruinous to the interests of the owner, or if the master be wholly unable to procure money wherewith to make repairs, he may, acting in good faith and for the benefit of all concerned, sell the ship.¹ But in case that the vessel could be repaired, it must manifestly appear that the sale was a necessary one to protect the interests of the parties, — and also, that the vessel was not only in great want of repairs, but, that money could not be obtained by the master to repair her; or, as the rule is stated, the necessity to sell must be of a moral nature.² Nor does it matter in respect to the master's right to sell, whether the vessel be stranded on the home shore, or in a foreign port.³ The doctrine has been laid down by Mr. Justice Story, in the following terms: ⁴ "It is not sufficient to a valid sale by the master, that he acted with good faith, and in the exercise of his best discretion. There must be a moral necessity for the sale, so as to make it an urgent duty upon the master to sell for the preservation of the interests of all concerned. If the circumstances were such, that an owner of reasonable prudence

¹ *The Fanny & Elmira*, Edwards, Adm. R. 118; *Green v. Royal Exch. Ins. Co.*, 8 Taunt. R. 775; *Idle v. Royal Exch. Ins. Co.*, 6 Taunt. R. 68; *Read v. Bonham*, 3 Brod. & Bing. 147; *Robertson v. Clark*, 1 Bing. R. 445; *Reed v. Darby*, 10 East, R. 140; *Hayman v. Molton*, 5 Esp. R. 65; *Allen v. Sugrue*, 8 Barn. & Cres. 561; *Somers v. Sugrue*, 4 Car. & Payne, 276; *The Tilton*, 1 Mason, R. 465; *The brig Sarah Ann*, 2 Sumner, R. 206, 215; *Gordon v. F. & M. Ins. Co.*, 2 Pick. R. 249; *Winn v. Columbian Ins. Co.*, 12 Pick. R. 279; *Fontain v. Phoenix Ins. Co.*, 11 Johns. R. 293; *Patapsco Ins. Co. v. Southgate*, 5 Peters, R. 604, 620; *Scull v. Briddle*, 2 Wash. C. C. R. 150; *Am. Ins. Co. v. Center*, 4 Wend. R. 45; *Pope v. Nickerson*, 3 Story, R. 465.

² *Ibid.*; *The Tilton*, 5 Mason, R. 465; *New England Ins. Co. v. The brig Sarah Ann*, 13 Peters, R. 387; *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, R. 220; *Gordon v. Mass. Fire & Mar. Ins. Co.*, 2 Pick. R. 249; *Hall v. Franklin Ins. Co.*, 9 Pick. R. 466.

³ *New England Ins. Co. v. The brig Sarah Ann*, 13 Peters R. 387; *S. C.* 2 Sumner, R. 206.

⁴ *The Sarah Ann*, 2 Sumner, R. 206.

and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lies, — then a sale by the master is justifiable, and must be deemed to have been made under a moral necessity. The master thus becomes the agent of all concerned in the voyage; and when an abandonment has been accepted by the underwriters, he becomes, by relation, their agent, from the time of the loss to which the abandonment relates; and a sale by him is made as agent of the underwriters.”

§ 115. A case of moral necessity will be made out whenever the vessel has suffered an actual total loss, and cannot be rescued at all from the peril; or, when she has suffered a technical total loss, and her repairs will cost more than her value after she is repaired; or, when the means of repairing her cannot be procured.¹ But the expense of making repairs is not to be estimated by their cost at the place where she lies, provided she can be put into a state to be navigated safely into a port where the repairs can be made for so much less a sum as to make it the duty of the master to repair her.²

§ 116. Again, the master may also sell the cargo in two cases. First, in case the ship be wrecked, so that she is unable to proceed upon the voyage, he may sell the cargo, provided it be of a perishable nature, so that it cannot be transmitted by another vessel.³ If it be not of a perishable nature, it is his

¹ *Gordon v. Mass. Fire & Mar. Ins. Co.*, 2 Pick. R. 249; *American Ins. Co. v. Center*, 9 Wend. R. 45; *Hall v. Franklin Ins. Co.*, 9 Pick. R. 466; *New England Ins. Co. v. The brig Sarah Ann*, 13 Peters, R. 387.

² *Hall v. Franklin Ins. Co.*, 9 Pick. R. 466.

³ *Pope v. Nickerson*, 3 Story R. 465; *The Gratitude*, 3 Rob. Adm. R. 240; *The Packet*, 3 Mason R. 255; *Shipton v. Thornton*, 9 Adolph. & Ell. 314; *Jordan v. Warren Ins. Co.*, 1 Story, R. 312.

duty to forward it in another vessel to its port of destination ; and if a vessel cannot be procured in the port where he is wrecked, he must go to a contiguous port to procure one.¹ But he is not obliged to go further than a "port immediately contiguous," for the purpose of seeking another vessel.² In case then he can find no vessel, in which to forward the goods, his duty would seem to be, if they were not perishable, to store the goods, and wait for orders from the shipper.³ Again, if, although it be of a perishable nature, it, nevertheless, can be transmitted without injury, he is bound to transmit it, if he can find a ship, and if he cannot, his duty is to sell.⁴ If, again, the vessel can be repaired in a reasonable time, and the cargo is not perishable, the master may store it until the repairs are completed, and then proceed with it in his own ship.⁵ Where the cargo is of a perishable nature, much is left to the discretion of the master, as to reshipment or sale thereof ; and the question is to be determined by the circumstances of each case, as it arises. It has, however, been laid down, that although the cargo be capable of being carried to its port of destination, yet, if it be so much injured, or so susceptible of injury, that it

¹ *Wilson v. Royal Exch. Assur. Co.*, 2 Camp. N. P. R. 623 ; *Schiefflin v. New York Ins. Co.* 9 Johns. R. 21 ; *Searle v. Scovell*, 4 Johns. Ch. R. 218 ; *Mumford v. Com. Ins. Co.*, 5 Johns. R. 262.

² *Saltus v. Ocean Ins. Co.*, 12 Johns. R. 112 ; *Treadwell v. Union Ins. Co.*, 6 Cowen, R. 276.

³ *Saltus v. Ocean Ins. Co.*, 12 Johns. R. 112 ; *Liddard v. Lopes*, 10 East, R. 526 ; *Treadwell v. Union Ins. Co.*, 6 Cowen, R. 276 ; *Wilson v. Millar*, 2 Stark. R. 1 ; *Am. Ins. Co. v. Center*, 4 Wend. R. 52 ; *Freeman v. East India Co.*, 5 Barn. & Ald. 617 ; *Abbott on Ship.* p. 240, 241, 243, and notes.

⁴ *Pope v. Nickerson*, 3 Story, R. 465 ; *Jordan v. Warren Ins. Co.*, 1 Story, R. 342 ; *Wilson v. Royal Exch. Assurance Co.*, 2 Camp. N. P. R. 623 ; *Shiefflin v. New York Ins. Co.*, 9 Johns. R. 21 ; *Saltus v. Ocean Ins. Co.*, 12 Johns. R. 112.

⁵ *Clark v. Mass. Fire & Marine Ins. Co.*, 2 Pick. R. 104 ; *Palmer v. Lorillard*, 16 Johns. R. 348.

will endanger the safety of the ship and cargo, or will greatly deteriorate, and be liable to be spoiled utterly, the master may sell it.¹

§ 117. Second; the master may sell a part of the cargo, when it becomes necessary, in order to effect repairs upon the vessel, and to enable him to carry the residue forward.² But he cannot sell the *whole* cargo for such purpose, and thus put an end to the adventure.³ So, also, he may sell a part of the cargo for the purpose of furnishing necessities to the ship, if he have no other funds available, — but not otherwise.⁴

§ 118. But a master of a vessel has no right to sell the cargo, or any portion of it, unless in case of a moral necessity, and in order to prevent a greater loss to the shippers; and in doing so, he must exercise a sound discretion. In case he is obliged to sell a part for the necessary repairs of the vessel, or for necessary equipments or furnishings, the owner would, if the sale were justifiable, be liable to the shipper to the full amount of the sales.⁵ If he sell the goods because of their perishable nature, and to prevent loss to the shipper, he becomes agent, in so far, for the latter, and is liable for the proceeds.⁶

§ 119. 6th. *Partners.* — Partners are mutual agents of

¹ *Jordan v. Warren Ins. Co.*, 1 Story, R. 312; *Pope v. Nickerson*, 3 Story, R. 465.

² *The Gratitude*, 3 Rob. Adm. R. 240; *Abbott on Ship*. Part 2, ch. 3, § 8; *The Packet*, 3 Mason, R. 255; *Pope v. Nickerson*, 3 Story, R. 465.

³ *The Gratitude*, 3 Rob. Adm. R. 240; *Searle v. Scovell*, 4 Johns. R. 218; *Hunter v. Princess*, 10 East, R. 393; *Saltus v. Ocean Ins. Co.*, 12 Johns. R. 107.

⁴ *Pope v. Nickerson*, 3 Story, R. 465.

⁵ *Ibid.*; and cases cited above.

⁶ *Ibid.*; see, also, cases cited above.

each other in respect to all things relating to the partnership. The act of one is the act of all, and all are liable to third persons on the contract of any one within the apparent scope and object of the partnership.¹ If the partnership be of a general commercial nature, each partner may purchase and sell, and make, and indorse notes, bills and checks, borrow money, pledge the partnership property, pay debts, and, in general, transact all the business relating incidentally to the partnership.² Each partner is, however, an agent only for the purposes of the partnership, and if he exceed his powers, he is personally responsible to the other members of the firm.³ So, also, his acts done in violation of his duty to the firm are not binding upon it, if the person with whom he deals be aware that he is transgressing the limits of his duty, and especially, if such person coöperate with him in so doing.⁴

§ 120. There are two exceptions to the general power of an agent, to bind the firm in transactions within the scope of the business of the partnership. First, he cannot, without the consent of his copartners, submit any matter to arbitration,

¹ Story on Partn. § 94, 101 ; 3 Kent, Comm. Lect. 43, p. 44 ; Watson on Part. ch. 2, p. 91 to 93, 2d ed. ; Gow on Part. ch. 2, § 2, p. 51 to 54 ; Fox v. Hembury, Cowp. R. 445 ; Coles v. Coles, 15 Johns. R. 159, 161 ; Anderson v. Tompkins, 1 Brock. Circ. R. 456 ; Baring v. Lyman, 1 Story, R. 396.

² Ibid. ; Collyer on Part. B. 3, ch. 1, § 1, 2, p. 215 to 230 ; South Car. Bank v. Case, 8 Barn. & Cres. 427 ; Vere v. Ashley, 10 Barn. & Cres. 288 ; Ex parte Bonbonus, 8 Ves. R. 540 ; Ex parte Agace, 2 Cox, R. 312 ; U. S. Bank v. Binney, 5 Mason, R. 176 ; S. C. 5 Peters, R. 529 ; Story on Part. ch. 7, § 101 to 125 ; Ersk. Inst. B. 3, tit. 3, § 20 ; 2 Bell, Comm. § 1203, p. 615, 617, (5th ed.)

³ Hasleman v. Young, 5 Adolph. & Ell. 803. See Story on Contracts, § 362, and cases cited. Story on Part. § 111, 127, 128.

⁴ 3 Kent, Comm. Lect. 43, p. 46, 47 ; Collyer on Part. B. 3, ch. 1, p. 212 ; 2 Bell, Comm. p. 615 to 618, (5th ed.) ; Sandilands v. Marsh, 2 Barn. & Ald. 673 ; Ex parte Agace, 2 Cox, R. 312, 316.

although it refer immediately to the business of the partnership.¹ Second, he cannot, without express authority given under seal, execute a specialty so as to bind his copartners.² To the latter exception, there is, however, a modification in England, to the effect, that, if the specialty be signed by one partner in the presence of the others, and with their consent, they will be bound thereby, although his authority so to do be merely by parol.³ In America, the exception is subject to still greater limitation and restriction, and the doctrine is held, that a previous parol authority, or a subsequent parol ratification, whether it be express or implied, is sufficient to give validity to a deed signed by one partner in behalf of the partnership; although, unless such assent or ratification be given, a deed so signed would only be binding on the particular partner.⁴

§ 121. A partner may bind his copartners as to third persons, although he act *malá fide*, and be guilty of fraud, pro-

¹ Com. Dig. Arbitrament, D. 2; 2 Bell, Comm. B. 7, p. 618, (5th ed.); *Stead v. Salt*, 3 Bing. R. 101; *Adams v. Bankart*, 1 Crompt. Mees. & Rose. 681; *Karthauss v. Ferrer*, 1 Peters, R. 222, 228; *Strangford v. Green*, 2 Mod. R. 228; *Buchanan v. Curry*, 19 Johns. R. 137; 3 Kent, Comm. Lect. 43, p. 49. In Pennsylvania and Kentucky, a different doctrine obtains, and one partner may, by a sealed instrument, submit a matter to arbitration so as to bind the firm. *Taylor v. Coryell*, 12 Serg. & Rawle, 243; *Southard v. Steele*, 3 Munroe, R. 433; *Catlin v. Evans*, 1 Dev. & Bat. 284. But see *Gow* on Part. ch. 2, § 2, p. 66; *Boyd v. Emerson*, 2 Adolph. & Ell. 181; *Harrison v. Jackson*, 7 T. R. 207; *Story* on Part. § 114 to 116.

² *Coles v. Coles*, 15 Johns. R. 159; *Story* on Part. § 94; *Harrison v. Jackson*, 7 T. R. 203; *Metcalf v. Rycroft*, 6 Maule & Selw. 75; *Elliott v. Davis*, 2 Bos. & Pul. 338; *Hawkshaw v. Parkins*, 2 Swanst. R. 543; *Skinner v. Dayton*, 19 Johns. R. 513.

³ *Ibid.*

⁴ *Harrison v. Sterry*, 5 Cranch, R. 289. See also *Cady v. Shepherd*, 11 Pick. R. 400; *Skinner v. Dayton*, 19 Johns. R. 513, and *Gram v. Seton*, 1 Hall, R. 262, wherein the whole question is thoroughly discussed. *Anderson v. Tompkins*, 1 Brock. Circ. R. 462.

vided his misrepresentation, or concealment, or admissions, or acknowledgments, or acts, be within the apparent scope of his authority ; and this doctrine stands upon reasons of public policy.¹ Of course, the rule does not apply to cases where the third person, with whom the partner deals, is cognizant of, or connives at his fraud.²

§ 122. If credit be given exclusively to one partner, his copartner will not be bound ; but this rule does not apply to contracts by a partner, in like manner as to contracts by a common agent ; for in the case of a partner, credit will only be deemed to be exclusively given to one, when given with a full knowledge, by the party with whom he deals, of all the partners. If, therefore, credit be given solely to a partner, it will not prevent the other person with whom he deals from having a remedy against any dormant or secret partner, of whom he is ignorant.³ This principle, however, only applies to commercial partnership.⁴

§ 123. These general principles as to agency, seem to be

¹ *U. S. Bank v. Binney*, 5 Mason, R. 176, 187, 188 ; *Etheridge v. Binney*, 9 Pick. R. 272 ; *Winship v. Bank of U. S.* 5 Peters, R. 529 ; *Story on Part.* § 105 ; *Mifflin v. Smith*, 17 Serg. & Rawle, 165 ; *Thilknesse v. Bromilow*, 2 Crompt. & Jerv. 428 ; *Clavering v. Westley*, 3 P. Wms. R. 402 ; *Swan v. Steele*, 7 East, R. 210 ; *Lacy v. McNeile*, 4 Dowl. & Ryl. 7 ; *Hilsley v. Mears*, 5 Barn. & Cres. 504.

² *Snaith v. Burridge*, 4 Taunt. R. 689 ; *Rogers v. Batchelor*, 12 Peters, R. 221 ; *Story on Part.* § 110 ; *Farrer v. Hutchinson*, 9 Adolph. & Ell. 641 ; *Ex parte Agace*, 2 Cox. R. 312.

³ *Story on Agency*, § 291, 292 ; *Story on Part.* § 138, 139 ; 2 Kent, Comm. Lect. 41, p. 630, 631 ; *Thompson v. Davenport*, 9 Barn. & Cres. 78 ; *U. S. Bank v. Binney*, 5 Mason, R. 176 ; *Winship v. Bank of U. S.*, 5 Peters, R. 529 ; *Mifflin v. Smith*, 17 Serg. & Rawle, 25 ; *Kelly v. Hurlburt*, 5 Cowen, R. 534.

⁴ *Pitts v. Waugh*, 4 Mass. R. 424 ; *Smith v. Burnham*, 3 Sumner, R. 435 ; *Saville v. Robertson*, 4 T. R. 725 ; *Robinson v. Wilkinson*, 3 Price, R. 538.

all that it is appropriate to the design of the present treatise to say. The student, who wishes more thoroughly to investigate the subject, is referred to the treatises devoted to its discussion.

CHAPTER IV.

MUTUAL ASSENT OF THE PARTIES.

§ 124. HAVING now seen what parties are competent to contract, it becomes necessary to consider the circumstances from which their mutual assent to certain terms can be legally implied. Since, if two persons wish to make a contract of purchase and sale, the question which immediately arises after their competency is established, is, whether they can agree upon the terms of the sale, and whether the mode in which their assent thereto is manifested, is legally sufficient to bind each to the other, despite a subsequent change of mind on the part of either.

§ 125. Assent may be either express or implied ; but it must be reciprocal, and in respect of a certain and definite proposition. A mere proposal or offer, which is not unequivocally accepted, constitutes no bargain. And so long as it is not accepted, it is in the option of the proposer to withdraw it or not.¹ But as soon as it is assented to, the compact is complete, and can only be broken, as it was made, by mutual consent. It is not necessary that assent should be given in any particular mode or form, provided it be unequivocally given. Thus, in a sale at auction, the bid may be retracted while it remains an offer, but the blow of the hammer settles the bargain, and is

¹ *Tucker v. Woods*, 12 Johns. R. 190 ; *Jackson v. Galloway*, 5 Bing. N. C. 75, 76 ; *Rowell v. Montville*, 4 Greenl. R. 270.

the intelligible and sufficient sign of a mutual consent.¹ Again, the pantomime of the deaf and dumb may as certainly and definitely complete a bargain, as the subtler and more intangible music of words. So, also, a bargain may be struck between two persons by any sign, which is mutually intelligible, and which is by custom or by particular agreement typical of assent. The contract of sale between Boaz and Elimelech,² was as securely ratified, when one took off his shoe and gave it to the other, as if both had signed, sealed, and delivered an instrument of sale; for it was among the Jews, “the manner to confirm all things, for a man to pluck off his shoe, and give it to his neighbor, and this was a testimony in Israel.”³ So, also, the modern custom of shaking hands on a bargain, which is borrowed from the northern nations;⁴ or the provincial custom of some parts of England of drawing a shilling across the hand; would be sufficient to complete a contract between persons to whom the act was typical.

§ 126. Where a verbal offer or proposal of sale is made, without any agreement as to the time within which it must be accepted, it should be accepted on the spot, or the person making it will not, ordinarily, be bound; for, however willing or desirous he may be at one moment, and under peculiar circumstances, to sell according to the terms of his offer, the law will not force him to abide by the same proposition at a different time, and under different circumstances. Yet if the circumstances of the case, or the custom of the trade, or the conduct of the parties, indicate that reasonable time was to be allowed, during which the proposal might be accepted, an assent given within reasonable time will complete the contract, unless the

¹ *Payne v. Cave*, 3 T. R. 143.

² Ruth, ch. iv. 8, 9.

³ Ruth, ch. iv. 7.

⁴ Bracton, l. 2, c. 27; Inst. l. 3, tit. 21.

proposal be previously retracted. What would constitute reasonable time in any case, would, however, depend upon its peculiar circumstances.¹ So, also, if a condition be connected with the offer, allowing a certain time, within which it may be accepted, an acceptance within such a time would be binding. Yet if the offer be retracted before the assent is given, it is said that no bargain would be effected, although the assent should be within the given time, because the offer being merely gratuitous, would be unsupported by any valid consideration until it was accepted; and, also, because there would be no mutual consent at the same moment. Thus, where A. proposed to exchange horses with B., and to give B. a specific sum as difference, upon which proposition B. had the privilege of reserving his determination until a certain day, and before that day, A. gave him notice, that he would not confirm the contract, it was held, that no action could be sustained by B. for the difference which A. had proposed to pay.² In such a case, the assent of the party to whom the proposal is made may be either express or implied, from the circumstances of the case. Thus, although ordinarily his mere silence, unconnected with other expressive acts, would not be sufficient to indicate his assent, so as to complete the contract;³ yet, wherever, by the terms of the offer, it is incumbent on him to express his dissent, or, wherever his acts afford an unequivocal presumption of assent, his acceptance will be implied.⁴

§ 127. It would, however, seem to be more consonant with justice, and with the agreement of the parties, to enforce a different rule, and to hold that, whenever an offer is made, grant-

¹ *Mactier v. Frith*, 6 Wend. R. 103; *Peru v. Turner*, 1 Fairf. R. 185.

² *Eskridge v. Glover*, 5 Stew. & Port. 264; Amer. Jur. No. 39, p. 15, 16-22; *Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 Bing. R. 661; *Payne v. Cave*, 3 T. R. 148.

³ *Corning v. Colt*, 5 Wend. R. 253.

⁴ *Train v. Gold*, 5 Pick. R. 380.

ing to a party certain time, within which he is to be entitled to decide as to whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time, unless by agreement with the other. The reason, which is given, that the offer is without consideration and gratuitous, until accepted, does not seem to be well founded. The consideration is the expectation or hope that the offer will be accepted, and this is sufficient legally to support the promise. The agreement is, therefore, to be looked upon as an engagement by the one party, that he will not sell within a certain time, in consideration that the other party will consider the matter, and not give a refusal at once. Again, the making of such an offer might betray the other party into a loss of time and of money, by inducing him to make examination, and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer.¹

¹ Com. Dig. Action on the case, Assumpsit, B.; *Violett v. Patton*, 5 Cranch, R. 142, 152; *Knight v. Rushworth*, Cro. Eliz. 469; *Brooks v. Ball*, 18 Johns. R. 337; *Perkins v. Binke*, 2 S.d. R. 123; *Travers v. —*, 1 Sid. R. 57; *Brett v. Pretzman*, 1 Sid. R. 283; *Loo v. Burdeux*, 1 Sid. R. 369; *Train v. Gold*, 5 Pick. R. 381. In *Violett v. Patton*, 5 Cranch, R. 142, it is said by Mr. Chief Justice Marshall: "To constitute a consideration, it is not necessary that a benefit should accrue to the person making the promise. It is sufficient, that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction." So in *Train v. Gold*, it is said, "Any gain to the promisor, or loss to the promisee, *however trifling*, is a sufficient consideration to support an express promise;" and this is affirmed in all the cases above cited. The mere fact, that the consideration is trifling, is not sufficient to render the promise gratuitous. In the case in question, if there were no consideration for the promise, what inducement could there be for the offerer to make his offer. It must be evident that he expected an advantage, or hoped it at least. See Story on Contr. ch. 1, § 215, *et seq.*, for the doctrine as to what constitutes a sufficient consideration, and the cases there cited. Again, it is not true that all gratuitous promises are void. Exceptions are allowed in cases of salvage, and a mandate, and of the contracts by infants, and of work and labor done, with the acquiescence of the party in whose favor it is done, though without his

Suppose, that, in faith of the offer, he proceed to make arrangements to enable him to purchase, or to make calculations to enable him to determine, whether he is in a condition to buy, or, whether the offer is worth accepting, and is fairly exerting his best judgment on the matter, is there any justice in allowing the other party to interfere and break his promise, after inducing a loss of time, or money, or convenience? Nor does this view of the matter want authority. The doctrine contended for has been asserted by Toullier in France, and is accepted in Scotland, and Holland.¹ "In France," says Toullier, "when he who makes an offer has fixed a determinate time for acceptance, or has expressly or tacitly engaged not to revoke before the answer of the other party, the promise is not revocable during the time; so, if I offer to you 100 pipes of wine at a certain price, and add, that I wait your answer before selling them to another, I cannot revoke my offer before the time necessary for having your answer. But if that answer is unduly delayed, I regain my freedom, which I had suspended only for a limited time."² Professor Bell, also, in his late work on Sales, reprobates the English rule. "It seems inconsistent," he says, "with the plain principles of equity, that a person who has been induced to rely on such an engagement, should have no remedy in case of disappointment. If, for example, a merchant propose to sell to another a cargo of sugar or of tobacco, and agree to give him a certain time to determine whether he will buy the goods or not, engaging not to dispose of them till the time has elapsed, and in the meanwhile he dispose of them, and disappoint the person to whom the promise has been made, who may have rejected an advantageous offer from

order, and in some cases of subscriptions. See Story on Contr. § 132, 133, *et seq.*; Limerick Acad. v. Davis, 11 Mass. R. 113; Story on Bailments, § 137, 164; Abbott on Shipp. Pt. 3, ch. 10.

¹ Code de Commerce de Hollande. Dispositions Générales, Art. 1, p. 65; 1 Stair, 3, 9.

² 6 Toullier, Droit Civ. Français, p. 33, no. 30.

another dealer, it seems unjust that, for the disappointment thus occasioned, there should be no remedy. The only answer to this in the English law, appears to be, that no one is entitled to rely on a unilateral engagement gratuitously made and without consideration. But one cannot help feeling, that a rule so different from what commonly happens in the intercourse of life, raises that inconsistency between law and justice, which is sometimes complained of. The subtleties of lawyers never ought to interfere with the common sense and understanding of mankind ; and the law is on a better footing where an engagement, seriously made, is by the law enforced, without regard to the motive from which it proceeds."

§ 128. Where an arrangement is made, that the person proposing to purchase shall have the right of trial during a certain time, the other party cannot conclude the negotiation, until the time allotted has elapsed. But if the article be taken on trial for a certain time, the party trying it must return it within such a time, or his bargain will become complete, and he will be liable for the price of the thing.¹ If no definite period be stated, within which trial shall be allowed, a reasonable time will be implied.² An agreement by both parties to conclude such an arrangement will be implied, however, from circumstances, so as to destroy the right of the person to whom the privilege of trial is given, from longer retaining the article.³

§ 129. Consent may not only be verbally manifested between parties, who are present together, but it may also be expressed through letters or messengers, if the parties be at a distance from each other. Where a proposition of sale is made by

¹ *Ellis v. Mortimer*, 1 Bos. & Pul. N. R. 257 ; *Reed v. Upton*, 10 Pick. R. 522 ; *Humphries v. Carvalho*, 16 East, R. 45. See also, Post.

² *Ibid.*

³ *Ibid.* See Post.

letter, the contract is closed as soon as the letter accepting it is deposited in the post-office ; but before that time, although the letter of acceptance be written, the writer is not debarred of his right to change his determination.¹ It is evident, that there must be some moment when the bargain is concluded, and this act is considered as sufficiently definite and decisive on the part of the acceptor, to indicate a certain assent. When this assent is given, there is an "*aggregatio mentium*," and what was before a proposal becomes an agreement. Neither party, therefore, can withdraw from the contract after such act, without the consent of the other ; and a letter of retraction written subsequently by either party would be of no effect. So, also, the acceptor cannot, by withdrawing his letter from the post, absolve himself from the agreement.² Thus where there was a correspondence relating to the insurance of a house against fire, consisting of an inquiry of the insurance company as to the terms upon which they were willing to insure, and an answer stating them, to which a letter was written accepting them, it was held that the contract was complete when the insured placed the letter in the post-office accepting the terms.³ But when an offer is made by letter, it may be retracted at any time before the person, to whom* it is made, deposits his letter of acceptance in the post-office ; for there can be no binding contract, by which both parties are not bound.⁴

¹ We shall hereafter see, that delivery is necessary in order to pass the actual property, but consent alone completes the contract.

² *Mactier v. Frith*, 6 Wend. R. 103 ; *Adams v. Lindsell*, 1 Barn. & Ald. 681 ; *Averill v. Hedge*, 12 Conn. R. 436 ; *Kennedy v. Lee*, 3 Meriv. R. 411 ; *Holland v. Eyre*, 2 Sim. & Stu. 194 ; *Potter v. Sanders*, 6 Hare, R. 1 ; *Dunlop v. Higgins*, 1 Clark & Fin. (N. S.) 381.

³ *Tayloe v. Merchants' Fire Ins. Co. of Baltimore*, 9 Howard, 390.

⁴ The rule stated in the text was conclusively settled in England by the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681. This was a case, where the defendants offered by letter to the plaintiffs to sell them certain goods,

§ 130. By the civil law the rule is, that if the person making the offer write a letter retracting it before the letter of

“receiving a letter in course of post.” The letter was misdirected, and arrived two days later than it ought, and was then immediately answered by the plaintiffs, who accepted the offer. In the mean time, the defendants had sold the goods to a third person. The Court, after full consideration, held, that as soon as the letter of acceptance was written and placed in the mail, the contract was concluded, and nothing remained to be done but to deliver the goods. They say; “the defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter.” They entirely disregarded the case of *Cooke v. Oxley*, (3 T. R. 654,) in which a contrary doctrine is held, but which is so deficiently and inaccurately reported, as to leave a doubt as to whether any acceptance was ever given, according to the terms of the proposal. Indeed, Bayley, J., in *Humphries v. Carvalho*, (16 East, R. 45,) states, that the ground of the decision in that case was, “that there was only a proposal of sale by one party, and no allegation, that the other party had acceded to the contract of sale.” If such were the fact, the case would not contradict the decision in *Adams v. Lindsell*. See also, *Kennedy v. Lee*, 3 Meriv. R. 441. This doctrine has been sustained by the Court of Errors in New York, in the case of *Mactier v. Frith*, (6 Wend. R. 103), and in Connecticut, in *Averill v. Hedge*, (12 Conn. R. 436.) See also 20 Am. Jur. No. 39, p. 20, in which the case of *Cooke v. Oxley* is ably criticized, and the doctrine of *Adams v. Lindsell* is maintained. So, also, see *Brisban v. Boyd*, 4 Paige’s R. 17; 2 Kent, Comm. Lect. 39, p. 477, and note (b), p. 646; *The Palo Alto*, 1 Daveis, R. 344; *Hamelton v. Lycoming*, 5 Barr, R. 339; *Levy v. Cohen*, 4 Georgia R. 1; *Potter v. Sanders*, 6 Hare, R. 1.

The Supreme Court of Massachusetts has, however, maintained the doctrine, that no acceptance of a proposal of sale is binding until knowledge thereof be received by the proposer. This point was decided in the case of *McCulloch v. The Eagle Ins. Co.* (1 Pick. R. 266), which was as follows. The Insurance Company on the 1st day of January, offered by letter to insure the brig of the plaintiff on certain terms. On the next day, the offer was retracted. On the third day, the letter containing the proposal was received by the plaintiff, who immediately wrote an answer, accepting the offer, and put it into the post-office before receiving the letter of revocation. The letter of acceptance, and that of revocation crossed each other on the road. The reasoning of the Court is as follows; “The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the

acceptance is placed in the post, but which does not reach the acceptor until afterwards, no binding contract would arise, because, as there could not be a mutual assent of both parties to one certain proposition at the same moment, there could be no simultaneous agreement of mind. But since it might be productive of very injurious results, if no security were given to the acceptor, the rule has been adopted, that if any loss, or injury, or inconvenience, or trouble, be occasioned to him by his acting upon the contract, as if it were completed, he shall

knowledge of the defendants, until the letter announcing the acceptance was received, or, at most, until the regular time for its arrival by mail had elapsed. Had the vessel arrived in safety on the 2d, or on the morning of the 3d, the plaintiff would not have accepted the offer, and was not bound to accept, so that the defendants would not have been entitled to any premium, and both must be bound in order to make the contract binding on either, unless time is given by one to the other," &c.

The first proposition in this reasoning is merely the affirmation of a new rule, or rather a new definition of the term "acceptance," which has already been differently defined by the decisions. If it be correct, it leads too far, since, if the defendants were not bound, until they received notice of the acceptance, by a parity of reasoning, the plaintiffs could not be bound until they received information that their acceptance was acceded to; and since at any moment during the correspondence, it could not be certain that a letter retracting either the acceptance or the offer was not on the road, neither party could ever be sure that the bargain was complete. Such a rule would tend greatly to embarrass all commercial intercourse, and to infuse doubt and delay into every contract. As to the second portion of the reasoning, the Court seem to have taken for granted, that the reason why, if the brig had arrived on the 2d or 3d, no contract would have arisen, was, that there would have been no proper acceptance; but does not the real reason seem to be, that the subject of the contract, (a voyage from Martinico to the U. S.) having failed, the contract also would fail; since, however perfectly the consent of both might have been expressed, yet if the contract be founded on the existence of something forming the subject of the agreement, which does not, in fact, exist, the agreement would be null and void, from error or mistake? But we suppose, that if the vessel had arrived at any time after the mailing of the letter of acceptance, the insurance would have been effected, and the plaintiff would have been liable for the premium.

have a claim therefor on the person making the offer. As, for instance, if any person offer by letter to give a certain price for any commodity or merchandise, and it be accepted, and the merchandise be retained for him, and he retract his offer by a subsequent letter written before it was accepted, he would be bound to make good any loss occasioned by a fall in the market between the receipt of the two letters. And this liability would result from the equitable doctrine, that, of two innocent parties, he who causes the injury should bear the loss.¹

¹ The law, as set forth in the text, follows that which is laid down by Pothier in his treatise on Sales, and which seems to be by far the fairest and most intelligible rule that can be found. It avoids the objections to the rule laid down by the Supreme Court in Massachusetts as well as to the English rule. Pothier says; "In this contract, as in others, the consent of the parties may be manifested not only between those who are present together, but also between those who are at a distance from each other, by means of letters, or through the intervention of an agent, *per epistolam, aut nuntium*.

"In order that the consent of the parties may take place, in the last-mentioned case, it is necessary that the will of the party, who makes a proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition.

"This will is presumed to continue, if nothing appears to the contrary; but, if I write a letter to a merchant living at a distance, and therein propose to him, to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain; or if I die; or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale. This is the opinion of Bartholus and the other jurists cited by Bruneman, *ad l. 1, § 2 D. de contrah. empt.* (18, l. 1, § 2), who very properly reject the contrary opinion of the Gloss, *ad dictam legem*.

"It must be observed, however, that, if my letter causes the merchant to

§ 131. The same general rule also applies to cases where an order for merchandise or commodities is sent by letter. If the article be forwarded before the retraction is written, the contract is completed, and the article is the property of the orderer, so that, if it be destroyed, he must bear the loss. But if the article be forwarded after the retraction is written, but before it is received, the orderer would be bound either to adhere to his proposition of sale, or to indemnify the other party. Again, if the article be not forwarded at all, but if the person, to whom it is sent, be put to trouble and expense by proceeding to comply with the order, as if, not having it on hand, he order it from another, he would have a sound claim

be at any expense, in proceeding to execute the contract proposed; or if it occasions him any loss, as, for example, if, in the intermediate time between the receipt of my first and that of my second letter, the price of that particular kind of merchandise falls, and my first letter deprives him of an opportunity to sell it before the fall of the price; in all these cases, I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity, that no person should suffer from the act of another; *Nemo ex alterius facto prægravari debet*. I ought therefore to indemnify him for the expense and loss, which I occasion him by making a proposition, which I afterwards refuse to execute.

“For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second which contains a revocation of it, or being in ignorance of my insanity or death, which prevents the conclusion of the bargain, charges to my account and forwards the merchandise; though, in that case, there cannot properly be a contract of sale between us, yet he will have a right to compel me or my heirs to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned.” *Contract de Vente*, No. 32. This doctrine is also approved by Duranton in his *Cours de Droit Français*, Vol. 16; *Contrat de Vente*, Liv. 3, Tit. 6, § 45; see also *Toullier des Contrats*, § 30; *Barbeyrac's Notes on Grotius*; *Story on Agency*, § 493, p. 630, n. (2); *Long on Sales*, (Rand's Ed.) 6, 183, 199; 2 *Kent, Comm. Lect.* 39, p. 477; *Brisban v. Boyd*, 4 *Page, R.* 17, 20; *Story on Contracts*, § 384.

on the other party for a complete indemnification in case the order was countermanded.¹

§ 132. Again, it is not necessary in all cases, where an offer is made by letter, that there should be an express acceptance ; acceptance will often be implied from the silence of the party to whom the offer is made, and also from his acts. Thus, if one offer to sell and send goods to his correspondent, unless he be forbidden in course of post, or before a certain time, the mere omission of the correspondent to forbid him to send them, will constitute a sufficient excuse, if he have received the letter. So, also, if an offer be made to purchase goods at a certain price, provided they are sent at a certain day, or by a certain conveyance, or provided a bill of lading is transmitted before such time, the transmission of the goods, and of the bill of lading, would operate as an acceptance and bind the offerer.²

§ 133. Where, after an order is sent, the orderer becomes insane or dies, and the person of whom they are ordered, being ignorant of such fact, forwards the goods ordered, the orderer or his representatives will be bound in like manner as if no such occurrence had taken place. If, therefore, he die before the goods are forwarded, or before any letter of acceptance is written, no contract will arise ; but if, nevertheless, the other party being in ignorance thereof, either forward the goods, or be put to any expense and labor, by proceeding to comply with

¹ Pothier, *Contrat de Vente*, No. 32 ; Duranton, *Cours de Droit Français*, Vol. 16 ; *Contrat de Vente*, Liv. 3, Tit. 6, § 45 ; ² Pardessus, No. 253 ; Bell on Sales, p. 38.

² Bell on Sales, p. 37 ; ² Pardessus, No. 253 ; ¹ Bell's *Illust. of the Law of Scot.* p. 84, 85 ; *Lombe v. Scott*, 17th Nov. 1779 ; *Farries v. Stein*, March 7th, 1799 ; S. C. March 24th, 1800.

the order, he will have the same claim for indemnification upon his representatives, as if no such event had occurred.¹

§ 134. It must be manifest, that the opposite rule would often be productive of mischief, and would greatly clog the facilities of trade. The greatest security, which a merchant can have in his commercial transactions, is certainty. If the offers or orders, which he may receive from foreign correspondents, cannot be immediately executed, because of fear and distrust lest they may be revoked, he must either narrowly restrict his business, and encumber it with an injurious delay, or he must trust to chances of luck. Any certain rule of trade, however arbitrary, is better than one which creates irresolution, and which is open to endless doubts. In the extended ramifications of commerce, profit and success depend on the number and rapidity of sales, as well as on their certainty; and to entail upon trade a cautious delay, would often be to rob enterprise of its fairest fruits. Suppose, for instance, that an offer is made by letter to a foreign correspondent to purchase a certain quantity of cotton, provided it can be obtained at a certain price, and the correspondent can, on the receipt of the letter, purchase at the stipulated price, the interests of both parties would be consulted by an immediate purchase. Yet the delay, which would be necessary, if he were obliged to write a letter stating that fact, so as to insure himself against any change of mind in the other party, would in all probability so change the state of the market, that the compliance with his order would be impossible. Indeed, the mutual orders and offers between merchants at different places, would be rendered useless in many instances, unless they could be instantly closed; and the necessary time, which would elapse between the moment when an order or offer was received and accepted, and the moment when that

¹ *Mactire v. Frith*, 6 Wend. 103; *Pothier, Contrat de Vente*, No. 32. *The Palo alto*, 1 Daveis, R. 344.

acceptance was made known to the orderer, would in all probability render the purchase or sale undesirable, according to the terms of the first proposition.

§ 135. It is for these reasons that the rule adopted by the English law seems best to satisfy the exigencies of trade, that it has been adopted. Indeed, it merely follows the practical usage among merchants, which common sense has approved as being the only rule which would, in some cases, not be productive of absolute injury. The same rule also obtains in the civil law.¹

§ 136. If a proposition be accompanied with certain conditions or limitations, the acceptance must correspond to it exactly, for if any alteration be suggested, or any exception be made to its exact terms, the provisional acceptance becomes merely a new proposition, which also requires an acceptance.² Thus, for instance, if a certain number of goods of a certain quality, be ordered at the same time, though at distinct prices, the orderer is not bound to accept goods of a different quality or quantity.³ So, also, if an order be sent for a certain num-

¹ It might also be added, that the rule, as it is laid down in the text, is borrowed from that which obtains in the civil law. It is here adopted, as being by far the most intelligible, and as avoiding an arbitrary rule, at the same time, that it meets all the exigencies of trade. It stands purely upon principle, and strongly recommends itself to reason. Besides, it serves to clear up the difficulty, which oppressed the Court in the decision of the case of *McCulloch v. The Eagle Ins. Co.*, at the same time, that it does not conflict or stop short of the English cases. Would it not be well, that it should be engrafted upon our system of jurisprudence?

² *Bruce v. Pearson*, 3 Johns. R. 531; *Tuttle v. Love*, 7 Johns. R. 470; *Champion v. Short*, 1 Camp. R. 53; *Routledge v. Grant*, 3 Car. & Payne, 267; S. C. 4 Bing. R. 653; *Eliason v. Henshaw*, 4 Wheaton, R. 225; *Bell on Sales*, p. 37; *Jaques v. Watt*, 12th Feb. 1817; 1 *Bell's Illust. of Law of Scot.* p. 84; *McNeill v. Cameron*, 21st Jan. 1830.

³ *Bruce v. Pearson*, 3 Johns. R. 531; *Tuttle v. Love*, 7 Johns. R. 470.

ber, or measure, or quantity, the orderer is not bound to accept or pay for any part of the goods, unless all are furnished, and on the terms agreed upon; but if he accept any one article, he is precluded from saying, that the order was entire, and he must accept and pay for as many as are individually furnished according to the contract.¹ So, also, if goods of a certain brand or mark be ordered, the orderer is not bound to receive goods of a different brand or mark, although they be of equal or superior quality.² So, also, where an offer is made to purchase or sell on certain terms of credit, an acceptance on different terms of credit will be insufficient.³ So, also, the same rule would apply, if in answer to an order for certain goods put up in a certain style, the same kind of goods should be sent in a different form; as, if thread in spools be ordered, and thread in skeins be sent. But if, in answer to an order, goods be sent which do not correspond thereto, and they be accepted without objection, an assent will be implied on the part of the orderer to the modified contract, and he will be liable thereupon.⁴ And an assent will, ordinarily, be implied from an entire absence of complaint on the part of the orderer, for an unreasonable length of time after receiving them. But if goods be sent of a different quality or value from those ordered, and the orderer accept them, he will not be liable according to the terms of his original order, but only for the market price of the goods actually sent, and the ordinary commissions and expenses. Yet, as we shall hereafter see, if the order be ambiguously expressed, and the person to whom it is sent, after using proper diligence to inform himself of its meaning, be actually deceived thereby, and send a wrong article, the orderer must bear the loss.

¹ *Baldey v. Parker*, 3 Dowl. & Ryl. 220; S. C. 2 Barn. & Cresw. 37; *Champion v. Short*, 1 Camp. R. 53.

² *Beals v. Terry*, 2 Sandf. Sup. Ct. R. 127.

³ *Tuttle v. Love*, 7 Johns. R. 470.

⁴ *Routledge v. Grant*, 3 Car. & Payne, 267; *Eliason v. Henshaw*, 4 Wheaton, R. 225.

§ 137. Again, where the parties to a contract of sale reduce their agreement to writing, it is to be taken as containing the final terms agreed upon, although there may have been previous treaty in respect to it, and various propositions and representations may have been made in relation to it, which do not harmonize with the written contract;¹ for the written contract is the very best evidence of the intentions of the parties, and the very object of reducing a contract to writing, is to avoid all parol evidence as to what the agreement is, and to satisfy each party of the understanding of the other, as to the stipulations of both. But if, during the negotiation of sale, the vendor make false and fraudulent representations, by which the vendee is induced to buy, he may, in an action on the case, or by a bill in equity, upon proof thereof, have his remedy against the vendor.²

§ 138. Where goods, not corresponding to the order, are sent by mistake, it becomes important for the orderer to know, what it is incumbent on him to do. If he elect to keep the goods, he should give notice to the consignor, that they do not correspond to his order, and then he will only be liable for their actual worth; but if he accept them without such notice, and make no complaint, a presumption would arise, that they corresponded to the order; which, although it may be rebutted by proof of the contrary, might perhaps occasion much inconvenience and expense.³ If he determine not to keep the goods,

¹ *Kain v. Old*, 2 Barn. & Cress. 634; *Vandervoort v. Col. Ins. Co.* 2 Caines, R. 161; *Mumford v. McPherson*, 1 Johns. R. 414; *Pickering v. Dowson*, 4 Taunt. R. 779; *Meyer v. Everth*, 4 Camp. R. 22; *Lowber v. Le Roy*, 2 Sandf. Sup. Ct. R. 202; *Sayre v. Peck*, 1 Barb. Sup. Ct. R. 464.

² *Dobel v. Stevens*, 3 Barn. & Cress. 623; 5 Dowl. & Ryl. 490; *Wright v. Crookes*, 2 Scott, N. R. 685; *Daniel v. Mitchell*, 1 Story, R. 172.

³ *Poulton v. Lattimore*, 9 Barn. & Cress. 259; *Fielder v. Starkin*, 1 H. Black. R. 17; *Adam v. Richards*, 2 H. Black. R. 570; *Street v. Blay*,

it is also his duty to inform the consignor immediately of his determination, and to await his orders. If the consignor refuse or neglect to receive them, or transmit no orders, the orderer may proceed, after notice to the former, to sell them at public auction, and may charge the consignor with warehouse rent, and the expenses of keeping, during such a period of time, after the refusal of the consignor, as is reasonably necessary to enable him to sell them.¹ If the consignors transmit special orders, after receiving information of the determination of the orderer not to keep the goods, of course such orders are to be strictly obeyed. Where the articles sent are perishable and the consignor is at a distance, so that it would be dangerous to await orders, the consignee is bound to sell them immediately on account of the consignor, and hold the proceeds to his credit; and then to give notice.

§ 139. Assent must not only be mutual, but it must also be given freely and without error or imposition. If either of the three elements of duress, mistake, or fraud, enter into the contract, it is not binding.²

§ 140. *Duress*.—In the first place, compulsion or duress will render a contract voidable, at the will of the party suffering it, and may be set up by him as a defence thereto at any subsequent time. But the party employing duress, cannot avail himself of it as a defence, if the contract, in respect to which it

2 Barn. & Adolph. 456; Greaves v. Ashton, 3 Camp. R. 425; McLean v. Dunn, 4 Bing. R. 726.

¹ Caswell v. Coare, 1 Taunt. R. 566; S. C. 2 Camp. R. 82; Germaine v. Burton, 3 Stark. R. 32; Chesterman v. Lamb, 4 Nev. & Man. 195; S. C. 2 Adolph. & Ell. 129; Ellis v. Chinnock, 7 Car. & Payne, 169; McKenzie v. Hancock, Ry. & Mood. 436; King v. Price, 2 Chitt. R. 416.

² McLean v. Dunn, 4 Bing. R. 726; Greaves v. Ashlin, 3 Camp. R. 425; Poulton v. Lattimore, 9 Barn. & Cres. 259; Fielder v. Starkin, 1 H. Bl. R. 17.

was used, be insisted upon by the other party.¹ Duress may be by imprisonment, or threat ; but it must be in respect of the person, and not of property.² Duress by threat, is divided by Lord Coke into four classes.³ 1st. Of loss of life ; 2d. Of loss of member ; 3d. Of mayhem ; 4th. Of imprisonment. It is unnecessary here to consider this subject in detail, since it is very seldom, if ever, applicable to sales of personal property.⁴

§ 141. *Mistake.*—In a contract of sale, a mistake may arise in respect to its legal incidents, or in respect to its subject-matter ; that is, the mistake may be one of law, or of fact. In respect to these two kinds of mistake, the rule is entirely different.

§ 142. In respect to matters of law, the maxim both at law and in equity is, that ignorance of law constitutes no excuse or defence to a contract. *Ignorantia juris neminem excusat.* The presumption is, that every man of a reasonable degree of intelligence, knows the law governing the facts which he knows. However arbitrary and ill-founded this presumption may be in point of fact, it has been thought to be required by public policy and convenience ; since, if the validity of a contract depended upon the legal knowledge of either party, the ignorance of the other party as to his actual knowledge, would entail delay and doubt upon every contract, and the impossibility of ever accurately gauging the actual amount of legal knowledge possessed by any one, would give rise to litigation, without surely answering the ends of justice. Besides, the

¹ Bacon, Abr. Duress, A. ; Bull, N. P. 172 ; Co. Litt. 253 ; 1 Black. Comm. 136 ; Sheppard's Touchstone, 61.

² Atlee v. Backhouse, 3 Mees. & Welsb. 650 ; Sumner v. Ferryman, 11 Mod. R. 201 ; Astley v. Reynolds, Str. R. 917.

³ Co. Litt. 253, (b.)

⁴ See Story on Contracts, § 87 to 100, for a full consideration of this subject.

best legal knowledge is, in many respects, merely an opinion, to which no certainty can be attached, and from which other equally accomplished minds may differ; and to hang the validity of a contract upon an uncertainty, is, virtually, to destroy all that confidence, which is the life of commerce. Again, any other rule would offer a premium to ignorance, and would deprive sagacity and knowledge of its fair fruits. If any party could claim to set aside his contract, because he did not understand the law applicable to it, it would be far safer to be ignorant than it would be to be wise, since if the result of the contract should not be favorable, the ignorant party would have the power to set it aside, whether it were made *bonâ fide* or not. For these reasons, the rule is established; and although in some instances it works injury, yet it serves to create mutual confidence between the parties contracting, and to give certainty and security to their contracts.

§ 143. Whatever mistakes, therefore, a man may make in respect to the legal incidents of his contract, he is, nevertheless, bound by it, unless fraud or imposition be practised upon him. Thus, a promise to pay a debt justly incurred, but to the recovery of which there is a legal bar or difficulty, — as a promise by the drawer to pay a bill of exchange, upon which time had been given by the holder to the acceptor, — would be binding.¹ So, also, if a vendor of a certain quantity of grain, should omit to separate it and identify it from the mass or bulk with which it was mixed, and it should be lost by fire, he could not claim the price from the vendor upon showing that he did not know the rule of law, rendering it his duty to distinguish the quantity sold, in order to avoid any risk.² So, also, when a vendor sells an article, fairly believing it to be his own, and for which he

¹ *Leslie v. Bailey*, 2 *Younge & Coll. N. R.* 91, 96, 97. See *Stevens v. Lynch*, 12 *East*, R. 38.

² See *Post*, § 389.

has given a valuable consideration, and it turns out to belong to another, he cannot set up, as a defence to an action by the vendee, that he did not mean to warrant his title, because the law implies such a warranty from the fact of his selling it.¹

§ 144. This rule also applies to cases where money is paid under a mistake of law. Whatever be the circumstances of the case, unless there be elements of fraud or surprise, no money paid through mistake of law can be recovered. This is the doctrine of the English and Roman law, and also obtains in America.² It has, however, been earnestly argued, by the

¹ Post, § 395.

² The principal English cases asserting this doctrine are *Billie v. Lumley*, 2 East, R. 471; *Brisbane v. Dacres*, 5 Taunt. R. 143; *Lowry v. Bourdieu*, 2 Doug. R. 468; *Stevens v. Lynch*, 12 East, R. 38; *Gomery v. Bond*, 3 Maule & Selw. 378; *East India Co. v. Tritton*, 3 Barn. & Cres. 280; *Milnes v. Duncan*, 6 Barn. & Cres. 671; *Branston v. Robins*, 4 Bing. R. 11; *Goodman v. Layers*, 2 Jac. & Walk. 262; *Mildmay v. Hungerford*, 2 Vent. R. 243; *Marshall v. Collett*, 1 Young & Coll. 232; *Stewart v. Stewart*, 6 Clark & Finnell. 966; *Herbert v. Champion*, 1 Camp. 134, subsequently affirmed by the House of Lords; *Kelley v. Solari*, 9 Mees. & Welsb. 54, 57, 58; *Wilson v. St. Clair*, 4 Wilson & Shaw, 398. In the Roman Law the doctrine has been held by Pothier and Heineccius. Pothier, *Oblig.* Pt. 4, ch. 3, § 1, n. 834; Pothier, *Pand. Lib.* 22, tit. 6; *Comm. ad Leg. VII., de Jur. et Fact. Ignor.*; Heinecc. *ad Pand. Lib.* 22, tit. 6, § 146. See, also, *The Digest*, *Lib.* 22, tit. 6, l. 9, § 3, 5; *Code*, *Lib.* 1, tit. 18, l. 10; 3 *Burge, Comm. on Col. & For. Law*, 742. The principal American cases are *Hunt v. Rousmaniere*, 1 Peters, Sup. Ct. R. 15; *Bank of U. S. v. Daniel*, 13 Peters, Sup. Ct. R. 32. In New York, *Shotwell v. Murray*, 1 Johns. Ch. R. 512; *Storrs v. Barker*, 6 Johns. Ch. R. 166; *Lyon v. Tallmadge*, 14 Johns. R. 526; *Clarke v. Dutcher*, 9 Cowen, R. 674; *Mowatt v. Wright*, 1 Wend. 355; *Ege v. Koonz*, 3 Barr, R. 109. In Massachusetts, *May v. Coffin*, 4 Mass. R. 347; *Warder v. Tucker*, 7 Mass. R. 452; *Freeman v. Boynton*, 7 Mass. R. 488; *Haven v. Foster*, 9 Pick. R. 112. In Alabama, *Jones v. Watkins*, 1 Stew. R. 81. In Connecticut, *Wheaton v. Wheaton*, 9 Conn. R. 96. In New Hampshire, *Pinkham v. Gear*, 3 N. Hamp. R. 163. In Tennessee, *Hubbard v. Martin*, 8 Yerg. R. 498. The opposite doctrine obtains in South Carolina; *Lowndes v. Chisolm*, 1 McCord, Ch. R. 445; *Lawrence v. Beaubion*, 2 Bail. R. 623; *Hopkins v.*

ablest writers on jurisprudence, that neither a payment, nor a promise to pay, made under a mistake of law, is binding. Indeed, since the rule itself is so arbitrary, and only finds its justification in public policy, it would seem more coincident with a liberal and wise system of law, that an exception should be allowed, whenever the reason of the rule fails. That it does fail in cases where money, which is not justly due, either by the moral or by the practical law, is paid under a mistake of law, is manifest; and it seems strange that the wise and clear distinction of Lord Mansfield has not met with the approbation of subsequent judges. He asserts the rule, applicable to this class of cases, to have always been, "That if a man has actually paid what the law would not compel him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back by this kind of action."¹

Mazyek, 1 Hill, Ch. R. 242; and in Kentucky, *Fitzgerald v. Peck*, 4 Litt. R. 25; *Underwood v. Brockman*, 4 Dana, 309.

¹ This doctrine, which was stated by Lord Mansfield in *Bize v. Dickason*, 1 Term R. 285, and was subsequently reaffirmed by him in *Ancher v. Bank of England*, 2 Doug. R. 637, is supported by many authorities; viz. *Gibbons v. Caunt*, 4 Ves. R. 894; *Stockley v. Stockley*, 1 Ves. & Beam. 23; *Naylor v. Winch*, 1 Sim. & Stu. 555; *Ancher v. Bank of England*, 2 Doug. R. 637; *Perrott v. Perrott*, 14 East, R. 422; *Lansdowne v. Lansdowne*, 2 Jac. & Walk. 205; *Turner v. Turner*, 2 Rep. in Ch. 154; See, also, an able discussion of this question in the *American Jurist*, Vol. 23, No. 46. So, also, among the civilians, Vinnius and D'Aguesseau maintain that money paid by mistake can be recovered. See, also, Evans's *Essay on the action of money had and received*, ch. 1, § 1, in which the same doctrine is maintained. But the Roman Law asserts the contrary doctrine, (*The Digest*, Lib. 22, tit. 6, l. 9, § 3, 5; *Code*, Lib. 1, tit. 18, l. 10,) and the English Law coincides with it. See *Stewart v. Stewart*, 6 Clark & Finnelly, 966, wherein all the cases are critically examined, and the doctrine of the text affirmed. See, also, *Kelley v. Solari*, 9 Mees. & Welsb. 54, 57, 58. So, also, the Supreme Court of the U. S. has followed the English and Roman rule. *Hunt v. Rousmaniere*, 1 Peters, S. C. R. 15; *Bank of U. S. v. Daniel*, 12 Peters, S. C. R.

§ 145. In respect to mistakes of fact, the rule is, that no contract of sale is reciprocally obligatory upon the parties thereto, if it be founded upon an injurious mistake of a material fact forming the basis of the contract; although such mistake be occasioned by no fraud or imposition.¹ [Thus, where bills of exchange were drawn upon a firm in Havre by their

32. In *Northop v. Graves*, 19 Conn. R. 548, Church, Ch. J., in delivering the judgment, says: "In the present case, we establish no new principle, nor depart from any well settled doctrine of the common law. We do not decide, that money paid by a mere mistake in point of law, can be recovered back; (a) as if it has been paid by an infant, by a feme covert, or by a person after the statute of limitations has barred an action, or when any other merely legal defence existed against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law; and this we insist, may be done, both upon the principle of *Christian* morals and the common law. And such only was the doctrine of the charge to the jury, in the present case. In such a case as we have stated, there can be no reasonable presumption that a gratuity is intended; nor is the maxim, *Volenti non fit injuria*, at all invaded. The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both, alike, the mind is influenced by false motives." See, also, the review of the cases in this judgment. See previous note for other authorities. See, also, Story on Contracts, § 100, and note 1.

¹ The Civil Law conforms with the Common Law, in respect to this rule. Pothier, Pand. Lib. 22, tit. 6, § 3, n. 4, 5, 6, 7, 10, 11; Ayliffe, Pand. B. 2, tit. 15, p. 116; *Ketchum v. Catlin*, 21 Vermt. (6 Wash.) R. 191; *Wheadon v. Olds*, 20 Wend. R. 174; *Merchants Bank v. McIntyre*, 2 Sandf. (Sup. Ct. R. 431; *Goddard v. The Merchants Bank*, 2 Sandf. Sup. Ct. R. 247; *Taylor v. Fleet*, 1 Barb. Sup. Ct. R. 471; *Miles v. Stevens*, 3 Barr. R. 21; *Bank of Commerce v. Union Bank*, 3 Comstock, R. 230.

(a) In the revised edition of *Swift's Digest*, vol. 1. p. 398, the learned editor refers to the case in the text, as having decided, without qualification, the general position here denied. The opinion of the court as now expressed, had not then been published; which at once accounts for, and excuses, this *mistake of law*.

agent in New York, and sold on the same day the drawees failed, but the agent, as well as the purchaser, was ignorant of such failure at the time of the sale of the bills; *Held*, that the sale was not fraudulent and void; but that the purchaser was entitled to have the contract rescinded, on the ground of a mutual mistake as to a material and essential fact.^{1]} The only consideration is, whether the mistake is in respect to a fact, which is material, and which would have modified or affected the mind of either party, had it been known at the time when the contract was made. If it be in respect to an immaterial and inconsequential fact which could have had no modifying power over the terms of the agreement, it will not furnish a sufficient ground to annul the agreement. Thus, a mistake of a quarter of an acre in a sale of a farm of twenty acres, was held not to furnish a good ground to rescind the sale, as it could not have formed so material a consideration as to effect the bargain. So, also, a mistake of half a yard of cloth in the sale of a piece; or of a pound or two of cotton in a bale, would not be of sufficient consequence to entitle the party making the mistake to avoid the sale. Yet if the exact quantity be an essential consideration of the purchase, a slight mistake therein might be sufficient to entitle the party deceived to have the contract annulled; as, if an article be sold for a definite purpose, and the mistake, though slight, renders it unfit therefor, the sale would not be binding.

§ 146. Nor does it make any difference, that the person making the mistake, might, by the exercise of a reasonable degree of diligence, have accurately informed himself concerning the matter which he mistook; for, in order to render the contract binding upon him, he must not only have possessed the means of knowledge, but he must actually have availed himself

¹ *Leger v. Bonaffe*, 2 Barb. Sup. Ct. R. 475.

of them.¹ The only force that the mere fact of his possessing the means of obtaining information has, is as evidence going to prove that he did not make a mistake, but acted with full knowledge of the matter which he pretends to have mistaken. And, therefore, unless such fact would, under the circumstances, necessarily imply knowledge, he will not be bound by his contract.² Thus, where a bill of exchange, drawn by A, and indorsed by B, was subsequently altered by the holder with the consent of A, and was finally paid by B, by his promissory note, who was ignorant of the alteration, although he had ample means of ascertaining it, his ignorance was held to be a good defence to an action on the note.³ So, also, the rule applies to cases where a person makes a mistake in respect to a matter, which, although it was formerly known to him, he has since forgotten; for, whether a mistake be occasioned by absolute ignorance, or only by forgetfulness, it is equally a mistake.⁴ There may, however, be cases, in which, by proper investigation, the person making the mistake might have informed himself concerning the actual state of the facts material to his contract, but he declines, or refuses to do so, and voluntarily assumes the risk of his ignorance and negligence, in which he would be bound to abide the consequences of his mistake. In these cases, the maxim applies, *Lex vigilantibus non dormientibus subvenit*.⁵

¹ Bell v. Gardiner, 4 Man. & Grang. 11; Lucas v. Worswick, 1 Mood. & Rob. 298; Kelly v. Solari, 9 Mees. & Welsb. 51; 1 Story Eq. Jurisp. § 140, p. 159; Wilkinson v. Johnston, 2 Barn. & Cres. 429; S. C. 5 Dowl. & Ry. 403; Chatfield v. Paxton, 2 East, R. 471, n.

² Penny v. Martin, 4 Johns. Ch. R. 566; 1 Story, Eq. Jurisp. § 146. The rule of the Civil Law is the same. Dig. Dib. 22, tit. 6, l. 9, § 2; Pothier, Pand. Lib. 22, tit. 6, § 4, n. 11.

³ Bell v. Gardiner, 4 Man. & Gran. 11; Lucas v. Worswick, 1 Mood. & Rob. 298.

⁴ Kelly v. Solari, 9 Mees. & Welsb. 54; Lucas v. Worswick, 1 Mood. & Rob. 298.

⁵ Bell v. Gardiner, 4 Man. & Gran. 11; Lucas v. Worswick, 1 Mood.

Again, if he make a mistake in respect to a matter, which it is his duty to know, he must bear the loss resulting therefrom, unless the mistake be occasioned by the fraud of the other party. If, therefore, payments be made *bonâ fide* to a bank in bank notes, purporting to be its own issue, and be accepted as cash, the bank will be bound thereby, although they be afterwards discovered to be counterfeit, because the officers of the bank are bound to know whether notes presented as their own are spurious or not.¹

§ 147. Where a personal trust or confidence forms the consideration of a contract, a mistake as to the person will invalidate the contract. Thus, if A agree to sell to a person whom he mistakes for B, a quantity of goods upon a certain credit, reposing an especial confidence and trust in the solvency and general character of B, the mistake would avoid the sale. Thus, where a broker made a mistake in the contract, by describing in his bought and sold notes, goods to be sold by A, B, and C, believing that those persons constituted the firm, which employed him to sell, and it appeared that, by a recent alteration in the firm, to which he was not privy, B and C had left it, and D and E had taken their places; it was held, that the purchaser was at liberty to avoid the sale, upon showing, that he was prejudiced in any way by the mistake. In this case, Chief Justice Gibbs said: "If the defendant could show any inconveniences which he has sustained by the inaccuracy of the broker, it might be an answer to the present action. Metcalfe (the broker) has misdescribed the names of his principals; and if, by this mistake, the defendant was induced to think that he had entered into a contract with one set of men,

& Rob. 298; *Kelly v. Solari*, 9 Mees. & Welsb. 54; 1 Story, Eq. Jurisp. § 140, p. 159; *Taylor v. Fleets*, 4 Barbour, Sup. Ct. R. 95.

¹ *Bank of U. S. v. Bank of Georgia*, 10 Wheat. R. 333; *Gloucester Bank v. Salem Bank*, 17 Mass. R. 33.

and not with any other; and if, owing to the broker, he had been prejudiced, or excluded from a set-off, it would be a good defence.”¹ But where a consideration for the person forms no inducement to the contract; and the party making a mistake as to the person would have made the same contract had he made no such mistake, the contract will be binding; on the ground, that the mistake is in respect to an inconsequential matter.²

§ 148. Where a material mistake occurs in respect to the *nature* of the subject-matter of a sale, there is no mutual assent, and, therefore, the contract is void. Thus, if an article be bought as being one thing, when it is, in fact, a different thing, the sale is voidable.³ As, where an article was bought as “waste silk,” which could not fairly be sold by such a name;⁴ or, where a certain material was brought as “scarlet cuttings,” which was not really “scarlet cuttings;”⁵ or, where a stone was sold as a bezoar stone, when it was not such a stone;⁶ or, where a bag containing pieces of leather and burnt clay, and bones, was sold as “a seroon of indigo;” the sale was merely void.”⁷

¹ Mitchell v. Lapage, Holt, N. P. R. 254.

² Brown on Sales, § 220, 221; Pothier, Traité des Oblig. n. 19; Bell's Illust. of the Law of Scotland, § 11, n. 5, p. 5.

³ Conner v. Henderson, 15 Mass. R. 319. This class of cases is usually treated as coming within the purview of implied warranty; but if they can be fairly considered to come under such a head, they are also governed by the simpler rules relating to mistake, or fraud, which would afford a surer remedy to the person injured. See Post, § 377. An implied warranty would seem only to relate to the quality or title of an article, and not to its nature. See Cornelius v. Molloy, 7 Barr. R. 293.

⁴ Gardiner v. Gray, 4 Camp. R. 144; Meyer v. Everth, 4 Camp. R. 22; Brown on Sales, § 215, 472.

⁵ Bridge v. Waine, 1 Stark. N. P. C. 504. See, also, Shepherd v. Kain, 5 Barn. and Ald. 240.

⁶ Chandelor v. Lopus, Cro. Jac. 4.

⁷ Williams v. Spafford, 8 Pick. R. 250. See, also, Thornton v. Kemp-

§ 149. The same rule applies to cases where a mistake arises as to the existence of the article sold. Thus, if the subject-matter of a sale be actually destroyed at the time of the sale, neither party is bound thereby, although the fact was unknown when the sale was made.¹ As, if a ship at sea be sold upon the supposition of her existence, and she, in point of fact, be foundered, or destroyed by wrecking, at that very time, the sale is void.² So, also, if a person should sell a house, proceeding upon the belief that it existed, when it was, in fact, consumed by fire; or should sell a horse believing him to be alive, when he was dead, no binding contract would arise.³

§ 150. A mistake may also arise in respect to the nature of the contract; one party considering it as a sale, and the other as a loan or a lease; or one considering it as an absolute sale, and the other as a conditional sale. In all such cases, there is no perfect consent, and, therefore, no sale.⁴

§ 151. Another class of cases, to which this rule is applicable, arises, when there is a mutual mistake of both parties, as to the extent or quantity of the subject-matter intended to be sold by the one and bought by the other. As, where certain articles are supposed by the purchaser to be included in a sale, which the vender did not intend to sell; or when, in the sale

ster, 5 Taunt. R. 786; S. C. 1 Marsh. R. 355, Brown on Sales, § 215, 218; Pothier on Oblig. No. 18; Binkershoek, Obs. Jur. Rom. lib. 6, cap. 14; Pothier, Contrat de Vente, No. 34; Ulpian, D. 18, l. 9, § 2.

¹ Hitchcock v. Giddings, 4 Price, R. 135; Allen v. Hammond, 11 Peters, Sup. Ct. R. 63; 1 Story, Eq. Jurisp. § 143; 2 Kent, Comm. Lect. 39, p. 469.

² Allen v. Hammond, 11 Peters, Sup. Ct. R. 63.

³ 1 Story, Eq. Jurisp. § 143; Allen v. Hammond, 11 Peters, Sup. Ct. R. 63. By the Roman Law, where the article sold was only partially destroyed, and one half remained, the vendee could be compelled to fulfil his contract. Dig. de Contrahenda Emptio, Lib. xviii. t. 1, art. 57.

⁴ Pothier, Contrat de Vente, § 37.

of a quantity or set, the purchaser supposes himself to be buying the whole, and the vendor supposes himself to be selling a part only. In such cases, since the mistake immediately touches the consideration, it will afford a sufficient ground for annulling the contract, if the mistake be other than trifling and insignificant,¹ and not otherwise.² Where, therefore, shingles were sold and delivered at \$3.25, but there was a dispute as to whether the \$3.25 was for a bunch or a thousand; it was *held*, that, unless both parties had understandingly assented to one of these views, there was no special contract as to the price.³

§ 152. A similar rule, also, applies to cases where several articles are mistakenly sold together by the seller as his own, and he cannot make a good title to some of them. If, in such cases, the contract be entire and not susceptible of apportionment, the mistake will furnish a good ground to the purchaser to avoid the contract, provided that the mistake be material, and also provided that he offer to return the goods within reasonable time.⁴ But if the contract be severable and susceptible of apportionment, the purchaser will be bound thereby as far as the seller can complete the contract, the purchase-money being ratably reduced.⁵

§ 153. So, also, a mutual mistake may arise in respect to the price. If the purchaser supposes the price to be *smaller*

¹ 1 Story, Eq. Jurisp. § 144; *Calverley v. Williams*, 1 Ves. jr. 210, 211; *Brown on Sales*, § 217. See Post, § ; *Milligan v. Cooke*, 16 Ves. R. 1; *Poole v. Shergold*, 1 Cox's Cas. 273; *Wheadon v. Olds*, 20 Wend. R. 74.

² *Winston v. Gwathney*, 8 B. Monroe, R. 23.

³ *Greene v. Bateman*, 2 Woodbury & Minot, 359.

⁴ *Chambers v. Griffith*, 1 Esp. R. 150; *Poole v. Shergold*, 1 Cox's Cas. 273.

⁵ *Voorhees v. De Meyer*, 2 Barb. Sup. Ct. R. 37.

than the seller actually intends, no sale would take place. If, however, the purchaser supposes the price to be *larger* than that which the seller intends to ask, the sale would be binding, because it could be productive of no injury to either, but only of absolute benefit to the vendee.¹

§ 154. A distinction, however, should here be made between the sale of articles of arbitrary value, and sales of articles of an absolute value, for if the article be of an arbitrary value, and its price would vary with the feelings of the parties, or the state of the market, a slight mistake in respect to quantity or price, which would not have materially affected the purchase, will not be a sufficient ground to set it aside. But if the article be of an absolute value, a mistake in respect to quantity or price would, of necessity, be material, and, therefore, would afford a good reason for annulling the contract. Thus, if in the sale of a hogshead of molasses, a mistake of a gallon should occur, it would be considered as immaterial, since the hogshead might, nevertheless, be worth the price given, and since the purchaser might have preferred that hogshead at that price to a fuller hogshead at the same price; that is, the price may have depended upon the whim of either party. But where the plaintiff bought a bar of silver, sending it previously to an assayer to be assayed, and by the assay it was calculated to contain a certain number of ounces, according to which the plaintiff paid, but which was afterwards found to exceed its actual weight, it was held that the plaintiff might, after offering to return the bar, have reclaimed the price in an action for money had and received, on account of the mistake.² The same distinction would seem also to exist between cases where articles are sold by mass, or in gross quantity, for an entire

¹ Brown on Sales, § 223; Pothier, Contrat de Vente, n. 36.

² Cox v. Prentice, 3 Maule & Selw. 344.

price, and where they are sold by weight or measure, at a certain price per pound or bushel.

§ 155. Again, a mistake may arise in respect to the vendor's *title or extent of interest* to the property sold ; as, if the vendor suppose his property to be free from all lien or incumbrance, when it is not so, in fact, — or, if he only own a portion of the property he sells as his own. In such cases, the general rule is, that the purchaser may claim damages at law, or when damages will not compensate him, he may insist in equity,¹ that the vendor shall specifically perform his contract, as far as he is able, — a proper abatement of the price being made for any deficiency in respect to the original agreement ; or he may altogether reject the contract and reclaim his purchase-money, provided that the deficiency in title or interest is of a material extent.² This rule is, however, subject to qualification under equitable circumstances, and, of course, is not applicable to cases of fraudulent sales.³

§ 156. Where a mistake occurs as to the quality or value of the article sold, the validity of the sale will depend on the existence of an express or implied warranty. If there be such a warranty in respect of the quality or value, the sale will be vitiated, if the article do not correspond thereto ; but if there be no warranty, the sale will be good.⁴

¹ 2 Story, Eq. Jurisp. § 718 ; Taylor v. Neville, cited 3 Atk. R. 384 ; Adderley v. Dixyn, 1 Sim. & Stu. 607, 610 ; Buxton v. Lister, 3 Atk. R. 384. Post, § 367 *d*.

² 2 Story, Eq. Jurisp. § 718, 779 ; Paton v. Rogers, 1 Ves. & Bea. 351 ; Graham v. Oliver, 3 Beav. R. 124 ; Waters v. Travis, 9 Johns. R. 465 ; Tod v. Gee, 17 Ves. R. 278 ; Wood v. Griffith, 1 Swanst. R. 54 ; Mes-tayer v. Gillespie, 11 Ves. R. 640 ; Farrer v. Nightingal, 3 Esp. R. 639 ; Post, 203, § 367, 423.

³ Ibid. ; Graham v. Oliver, 3 Beav. R. 124.

⁴ See Post, § 348 ; Brown on Sales, 285, *et seq.* ; Pothier, Contrat de Vente, No. 35.

§ 157. In this connection, the distinction between a mistake of facts, and an ignorance of facts, should be strictly borne in mind ; for the law will often adjudge relief in cases of mistake, when it would not in a mere case of ignorance. A mistake arises from a belief in the existence of a fact which does not exist; but ignorance is merely the absence of knowledge, and proceeds upon no belief. One is positive, the other is negative. In the former case, therefore, the belief in the fact mistaken may form the solid basis of the whole contract, and may positively mislead the judgment and influence the opinion ; in the latter case, however, the fact of which a party is ignorant, although it might operate as a future injury, could not have positively influenced his decision. However shadowy this distinction may appear, yet it finds its justification in public policy ; for to allow mere ignorance of a material fact, unconnected with any fraud or surprise by the other party, to be sufficient ground for annulling a contract, would be to render all agreements unstable, and to foster negligence. In almost every contract, one party knows more than the other of the facts bearing upon it, and if he thereby acquire a superiority and make a better bargain, ought he to be injured by the negligence or carelessness of the other? Cases may indeed occur, in which injury may be worked by this rule, but they will generally prove to be compounded of such elements of surprise or fraud as will operate to induce relief from a court in equity. The rule, however, would seem to be well established, that mere ignorance of fact, unconnected with any fraud or surprise by the other party, is not a sufficient ground to entitle a party to avoid his contract ; although, had the fact been known, the relative position of the parties might have been altered, and the value of the subject-matter greatly enhanced.¹

¹ Fox v. Mackreth, 2 Bro. Ch. R. 420 ; Turner v. Harvey, 1 Jacob, R. 178 ; Pothier, Contrat de Vente, n. 234 to 242 ; 1 Story, Eq. Jurisp. § 147, 205 ; Earl of Bath v. Montague's case, 3 Ch. Cas. 56, 74, 103, 114.

Thus, if A should sell to B a piece of land, in which there was a mine, of the existence of which A was ignorant, the sale would be binding upon A, although the mine should be afterwards discovered.¹ Indeed, the rule goes further than this, and governs even though B actually knew of the existence of the mine when he bought the land, unless he was guilty of some fraud.² We are, therefore, naturally led to consider, in the next place, the circumstances from which fraud will be implied in matters of mistake and ignorance.³

§ 157 *a*. But although a material mistake occur, which, had it been discovered within reasonable time, would have afforded a good ground for setting aside the sale, yet after the lapse of such a length of time as to render it impossible to reinstate the parties to their original position or rights, and do practical justice between them, the contract will not be set aside.⁴

§ 158. *Fraud*. — If any contract be infected by fraud, it is void. Fraud has been defined to be “every kind of artifice, employed by one person for the purpose of deceiving another.” This is sufficiently descriptive of actual or positive fraud; but the courts have refused accurately to define the term, or to lay down exact rules concerning its nature, or the evidence necessary to prove it, through a fear that their powers might be thereby cramped, and an opportunity created for ingenuity and craft to evade the law.⁵ Fraud, therefore, can only be defined

¹ Fox v. Mackreth, 2 Bro. Ch. R. 420.

² Ibid.; East India Co. v. Donald, 9 Ves. R. 275; 1 Story, Eq. Jurisp. § 147.

³ 1 Pothier on Oblig. by Evans, Pt. 1, ch. 1, art. 3, n. 28, p. 19.

⁴ Okill v. Whittaker, 2 Phillips, R. 338; S. C. 1 De Gex & Smale, 83.

⁵ See Lord Hardwicke's letter to Lord Kaimes of the 30th of June, 1759, (Parke's Hist. of Chan. p. 508); Lawley v. Hooper, 3 Atk. R. 279; 1 Domat, Civil Law, B. 1, tit. 18, § 3, art. 1.

to be fraud, and is a fact to be inferred or repelled from the circumstances of each particular case.¹

§ 159. No person, who is guilty of fraud, can take advantage of it, unless it be in some few cases, which are excepted upon grounds of public policy. Ordinarily, therefore, and in all cases of sale, the party defrauding is bound by his agreement, if the party defrauded choose to hold him to it.² The party defrauded has the option of acquiescing in the agreement, or of avoiding it; but if he elect the latter alternative, he is bound to manifest his determination within a reasonable time after the discovery of the fraud. The time, which elapses before he becomes acquainted therewith, is of no consequence, provided that he avoids his contract within a reasonable time afterwards. But if after he discovers the fraud, he remains silent, under circumstances in which silence would indicate acquiescence; or, if he act or deal in relation to the subject-matter in such a mode as to imply a willingness to stand by his bargain; he is considered as ratifying it, and he cannot afterwards avoid it.³ If, therefore, he compromise the whole matter by agreement with the other party; or release him from liability; or expressly agree

¹ The following definitions of Fraud were given in the Roman Law: "Dolum malum Servius quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. Labeo, autem, posse et sine simulatione id agi, ut quis circumveniat; posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt, qui per ejus modi dissimulationem deserviant, et tumentur vel sua vel aliena. Itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumvenendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est. Dig. Lib. 4, tit. 3, § 2. De Dol. Mal."

² *Deady v. Harrison*, 1 Stark. R. 60; *Montefiori v. Montefiori*, 1 Black. R. 363; *Doe d. Roberts v. Roberts*, 2 Barn. & Ald. 367; *Story on Cont.* § 167; *Post*, § *Armstrong v. Toler*, 11 Wheat. R. 258; *Hanney v. Eve*, 3 Cranch, R. 242.

³ *Campbell v. Fleming*, 1 Adolph. & Ell. 40; *S. C.* 3 Nev. & Man. 834; *Selway v. Fogg*, 5 Mees. & Welsb. 81; *Miles v. Dall*, 3 Stark. R. 25.

to waive all rights resulting to him from the fraud; he cannot claim to set aside his contract.¹ Again, if he would avail himself of the fraud to avoid the contract, he must exercise his right of rescission immediately upon the discovery of the fraud; for if, after knowledge thereof, he deals with the subject-matter of the contract as his own, he cannot repudiate the contract, although he should afterwards discover further circumstances connected with the same fraud.² If both parties be guilty of fraud, the law will leave them as it finds them, and will enforce no claim by the one against the other.³

§ 160. Fraud must be clearly established by proof in order to vitiate a contract; and this rule obtains as well in Equity as in law. *Dolum ex indicibus perspicuis probari convenit.*⁴ No cases, therefore, in which the circumstances of the case are doubtful, or where they are merely suspicious, or throw a shadow of doubt upon the intent of either party, will afford a sufficient evidence of fraud.⁵ Again, it is not necessary that positive and express proof thereof should be given, provided that the circumstances manifestly show that fraud was practised.⁶ Thus, it will be presumed to exist in the case of a bill of sale, or conveyance, without surrender of possession by the vendor, as far as creditors are concerned, although the transaction may

¹ *Parsons v. Hughes*, 9 Paige, R. 591; *Vigers v. Pike*, 8 Clark & Finell. R. 562, 630.

² *Campbell v. Fleming*, 1 Adolph. & Ell. 40; S. C. 3 Nev. & Man. 834; *Selway v. Fogg*, 5 Mees. & Welsb. 81.

³ *Taylor v. Weld*, 5 Mass. R. 116; *Deady v. Harrison*, 1 Stark. R. 60; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; *Doe d. Roberts v. Roberts*, 2 Barn. & Ald. 369; *Hannay v. Eve*, 3 Cranch, R. 242; *Holman v. Johnson*, Cowp. R. 341.

⁴ Cod. Lib. 2, tit. 21, § 6.

⁵ *Trencher v. Wanley*, 2 P. Will. R. 166; *Chesterfield v. Janssen*, 2 Ves. R. 155; *Fullagar v. Clark*, 18 Ves. R. 483; 10 Coke, R. 56; 1 Story, Eq. Jurisp. § 190. So, also, in the Civil Law. Cod. Lib. 2 tit. 21, l. 6.

⁶ *Ibid.*

be fair between the parties ; and it is necessary that such presumption should be repelled by proof.¹ In respect to questions of fraud, the jurisdiction of Courts of Equity is far more extensive and unrestricted than that of Courts of Law, and in cases of constructive fraud, complete relief is seldom to be attained, except by the intervention of Equity rules. Indeed, relief will often be granted in Equity in cases where the evidence upon which it is granted, would not support a verdict at law.² But, at law, whenever the fact of fraud clearly appears, it will always furnish a ground to declare the contract made upon such a basis, void, — although a court of law cannot always afford relief in the same way, and to the same extent as a Court of Equity ; and, if the litigant parties be so situated in respect to the subject-matter, that relief can there be practically and effectually applied, fraud will avail as a ground of complaint or defence as well in a court of law as in a Court of Equity.³

§ 161. By the Roman Law a distinction was made between cases of positive fraud or *dolus malus*, and cases where one had acquired an advantage over the other by sharpness and craftiness ; *solertia* or *dolus bonus*. As to the latter, the maxim was : “ *In pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire.*”⁴

§ 162. In regard to the latter class, Pothier says : “ *Dans le for intérieur, on doit regarder comme contraire à cette bonne foi, tout ce qui s'écarte tant soit peu de la sincérité la plus exacte et la plus scrupuleuse : la seule dissimulation sur ce*

¹ *Edwards v. Harben*, 2 T. R. 595 ; *Hamilton v. Russell*, 1 Cranch, R. 309 ; *Meeker v. Wilson*, 1 Gallison, R. 419 ; *Steele v. Brown*, 1 Taunt. R. 382 ; *Conard v. Atlantic Ins. Co.*, 1 Peters, R. 449. See also, Post, §

² 1 Story, Eq. Jurisp. § 190 ; *Broderick v. Broderick*, 1 P. Will. R. 240 ; *Chesterfield v. Janssen*, 2 Ves. R. 155 ; *Fullagar v. Clark*, 18 Ves. R. 483.

³ *Boynton v. Hubbard*, 7 Mass. R. 19 ; *Hazard v. Irwin*, 18 Pick. R. 104.

⁴ Dig. Lib. 4, tit. 4 § 16. De Minor. vig. ann.

*qui concerne la chose qui fait l'objet du marché, et que la partie avec qui je contracte auroit intérêt de savoir, est contraire à cette bonne foi ; car puisqu'il nous est commandé d'aimer notre prochain autant que nous-mêmes, il ne peut nous être permis de lui rien cacher de ce que nous n'aurions pas voulu qu'on nous cachât, si nous eussions été à sa place. Dans le for extérieur, une partie ne seroit pas écoutée à se plaindre des ces légères atteintes que celui avec qui il a contracté auroit données à la bonne foi ; autrement il y auroit un trop grand nombre de conventions qui seroient dans le cas de la rescision, ce qui donneroit lieu à trop de procès, et causeroit un dérangement dans le commerce. Il n'y a que ce qui blesse ouvertement la bonne foi qui soit, dans ce for, regardé comme un vrai dol, suffisant pour donner lieu à la rescision du contrat, tel que toutes les mauvaises manœuvres et tout les mauvais artifices qu'une partie auroit employés pour engager l'autre à contracter ; et ces mauvaises manœuvres doivent être pleinement justifiées.*¹ This doctrine seems, also, to obtain in the Scottish Law.²

§ 163. So, also, by the Roman and Scottish Law, the contract was only liable to reduction on account of fraud, where fraud was employed to induce a party to make a contract, (*ubi dolus debet causam contractui*,) which he would not, otherwise have made. Where the fraud is merely incident to the contract, that is, when a party intending previously, and of his own accord, to enter into a contract, is merely deceived in *modo contrahendi*, the contract is not thereby vitiated, but the party

¹ Pothier des Oblig. Pt. 1, Art. 3, No. 30, p. 19. It is perhaps unnecessary to say, that by the "for intérieur," Pothier means the conscience, which is governed by principles of morality only ; while by the "for extérieur," he means the Courts of Law, which are governed solely by the practical law.

² Stair, p. 79, § 9 ; p. 700, § 23 ; Brown on Sales, p. 406.

defrauded has a claim for damages to the extent of his injury.¹ This distinction does not, however, obtain in the Common Law, or to be admitted in Equity.

§ 164. In most of the cases in which fraud occurs, it consists either of misrepresentation or concealment; and it is in these forms, that it is most insidious, and least susceptible of distinct proof in a particular case. In respect to all questions of fraud, the rules of law are, however, broad and general, partaking of the expansiveness of equity; and cases of suspicion are most narrowly scrutinized.

§ 165. *Misrepresentation.* — Any misrepresentation of a material fact, made by one party with a design to deceive the other party to his injury, is a fraud, which annuls a contract made upon the basis thereof.² Nor does it matter whether the party making the misrepresentation knew it to be false, or was utterly ignorant in respect to the fact that he stated, provided it was material, and the other party had a right to rely upon it and was deceived, since the affirmation by a party, that a fact is true, which he neither knows nor believes to be true, is no better, in morals nor in law, than to tell an absolute lie.³ Indeed, the rule goes farther; for if a false representation be inadvert-

¹ Pothier on Oblig. No. 31; Brown on Sales, § 582, p. 406; Voet, Lib. 4, tit. 3 § 3. Novat, (*de Forma Emendandi doli mali*, Cap. 3 et 14,) however, insists, that this distinction has no foundation in principle, or in the text of the Roman Law; but in his opinion, he seems to stand alone among the Civilians. See Heinn. ad Panda. Lib. 4, tit. 3, § 481; Stair, p. 79, § 9.

² Laidlaw v. Organ, 2 Wheat. R. 178; Pidcock v. Bishop, 3 Barn. & Cres. 605; Smith v. The Bank of Scotland, 1 Dow, Parl. R. 272; Evans v. Bicknell, 6 Ves. R. 173, 182; Cochran v. Cummings, 4 Dall. 250; Prentiss v. Ross, 4 Shep. R. 30; Smith v. Richards, 13 Peters, R. 26; Hazard v. Irwin, 18 Pick R. 95; Cornelius v. Molloy, 7 Barr. R. 293.

³ Ainslie v. Medlycott, 9 Ves. R. 21; Graves v. White, Freem. R. 57; Pearson v. Morgan, 2 Bro. Ch. R. 389; Collins v. Dennison, 12 Metcalf, R. 549; Elliot v. Boaz, 9 Alab. R. 772.

ently made by a person, believing it to be true, if it operate to deceive and mislead him to whom it is made, it will be treated as a fraud, and vitiate the contract.¹ Thus, where the lease of a house, described as “a free public house,” was sold, and the lease itself contained a proviso that the lessee and his assigns should take all their beer from a particular brewery, the misdescription was held to be fatal. So, also, where the particulars of a sale of certain leasehold premises in Covent Garden, stated, that, under the original, “no offensive trade was to be carried on, and that the premises could not be let to a coffee house, or working hatter,” but the original lease, when produced, prohibited the business of brewer, baker, fruiterer, herb-seller, and many others; it was held, that there was such a material discrepancy between the particulars and the lease, as to entitle the purchaser to rescind the sale.² The question of fraud does

¹ *Flight v. Booth*, 1 Bing N. C. 377; *Jones v. Edney*, 3 Camp. R. 284; *Sherwood v. Robins*, 3 Car. & Payne, 339; *Pearson v. Morgan*, 2 Bro. Ch. R. 389; *Burrows v. Locke*, 10 Ves. R. 475; *De Mannville v. Compton*, 1 Ves. & B. 355; *Ex parte Carr*, 3 Ves. & B. 111; *Foster v. Charles*, 6 Bing. R. 396; *S. C.* 7 Bing. R. 105; 1 Story, Eq. Jurisp. § 193; *Daniel v. Mitchell*, 1 Story, R. 189, 190; *McFerran v. Taylor*, 3 Cranch, R. 270; *Roosevelt v. Fulton*, 2 Cowen, R. 131; *Taylor v. Ashton*, 11 Mees. & Wels. 401, 415; *Waring v. Hoggart*, 1 Ry. & Mood. 39; *Stewart v. Alliston*, 1 Meriv. R. 26.

² *Flight v. Booth* 1 Bing. N. C. 377. In this case Ch. J. Tindal said: “It is extremely difficult to lay down, from the decided cases, any certain definite rule, which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy*, 1 Campb. R. 340; *Wright v. Wilson*, 1 Mood. & Rob. 207; whilst other cases lay down the rule, that a misdescription in a material point, although

not depend upon the fraudulent intention, but often upon the practical result of the misrepresentation. And where false representations are made, operating as material inducement to the contract, it is not necessary to give proof of a fraudulent intent by the party making such representations.¹ Nor does it matter in what mode or by what means the deception is practised; whether by signs, by words, by silence, or by acts; provided, that it actually produce a false and injurious impression.² And, in order to found a right in the defrauded party to avoid his contract, it is not necessary that the party guilty of the fraud should appear to have been benefited by it, or to have colluded with the person who is.³

§ 165. *a.* Again, it is not necessary that a person should be clearly and personally guilty of misrepresentation; for if he

occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, 3 Campb. R. 284; *Waring v. Hoggart*, 1 Ry. & Mood. 39; and *Stewart v. Alliston*, 1 Mer. R. 26. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

¹ *Collins v. Dennison*, 12 Metcalf, R. 549; *Taylor v. Fleet*, 1 Barb. Sup. Ct. R. 471; *Hunt v. Moore*, 2 Barr. R. 105.

² *Ainslee v. Medlycott*, 9 Ves. 21; *Graves v. White*, Freem. R. 57; 2 Black. Comm. 165; 1 Story, Eq. Jurisp. § 193, 202; 2 Kent, Comm. Lect. 39, p. 482; Dig. Lib. 18, tit. 1, c. 43, § 2; *Pothier de Vente*, n. 234, 237, 238; *Cochran v. Cummings*, 4 Dall. R. 250; *Cornfoot v. Towke*, 6 Mees. & Welsb. 358; *Willink v. Vandervear*, 1 Barb. Sup. Ct. R. 599; *Martin v. Pennock*, 2 Barr. R. 376.

³ *Pasley v. Freeman*, 3 T. R. 51.

take advantage of a misrepresentation in his favor by a third person, and act upon it as if it were true, he thereby assumes the fraud as his own, and is liable therefor. Thus, if he obtain credit upon a misrepresentation by another, of material facts as to his solvency, or property, &c., with knowledge that the party with whom he deals acts upon such false information, he is liable in the same manner as if he himself made the representation.¹

§ 166. The misrepresentation must, however, be in respect to a material fact, operating as an inducement or consideration to the contract.² Thus, if, in the sale of a ship, the vendor should falsely represent her to be copper fastened; or to be newly rigged; or to have been built within a year; the vendee would not be bound by the sale.³ So, also, a false representation, that a steam engine was of twenty horse power; that it was fit for mining purposes; that it was in good order, and had so been certified by engineers; that it was free from rust; and that it had been standing for two or three years, was held to be such a fraud as to vitiate the contract, because each misrepresentation was in respect to a material fact, and operated to deceive the purchaser.⁴ But if the misrepresentation be in respect to an entirely immaterial fact, exerting no influence upon the mind of the purchaser; as, if the vendor represent a ship as being in complete repair, when there were several slight particulars in which she was out of repair, the sale would

¹ *Fitzsimmons v. Joslin*, 21 Verm. (6 Wash. R.) 129

² *Lowndes v. Lane*, 2 Cox, R. 363; *Daniell v. Mitchell*, 1 Story, R. 172; 1 Domat, B. 1, tit. 2, § 11, art. 12; Dig. Lib. 18, tit. 1, C. 31; *Jarvis v. Duke*, 1 Vern. R. 19; 1 Story, Eq. Jurisp. § 196; *Phillips v. Duke of Bucks*, 1 Vern. R. 227; *Hazard v. Irwin*, 18 Pick. R. 95; *Bradley v. Bosley*, 1 Barbour, Ch. R. 125.

³ *Lowndes v. Lane*, 2 Cox, R. 363; 1 Story, Eq. Jurisp. § 196; *Shepherd v. Kain*, 5 Barn. & Ald. 210; *Fletcher v. Bowsher*, 2 Stark. R. 561.

⁴ *Hazard v. Irwin*, 18 Pick. R. 95.

nevertheless be binding.¹ Whether in a particular case the misrepresentation were or were not material, is a question for the jury.²

§ 167. Again, the misrepresentation must have operated actually to mislead to his injury the party trusting to it; for if he knew, at the time when it was made, that it was false, it could have had no influence upon his decision; and as the reason of the rule fails, the rule itself does not apply.³ So, also, if the misrepresentation be productive of no injury, its mere falsity will furnish no ground to set aside the contract. But although the representation be apparently true, if in reality it operate as a deception, and especially if it also be intended to deceive, the contract will be void.⁵ If, therefore, words having a double meaning be used by either party, and the other party be mislead by them, no valid agreement arises. Thus, if a vendor should, in selling a bar of German silver, affirm it to be silver, and the purchaser should be thereby deceived into the belief that it was Mexican silver, the sale would be void,

¹ *Ibid.*; *Morris Canal Co. v. Emmett*, 9 Paige, R. 168; *Stebbins v. Eddy*, 4 Mason, R. 414; *Winch v. Winchester*, 1 Ves. & B. 375.

² *Lindenau v. Desborough*, 8 Barn. & Cres. 586; *Westbury v. Aberdeen*, 2 Mees. & Welsb. 267.

³ "Fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur and meet together, there an action lieth." *Croke, J.*, 3 Bulstr. R. 95; *Foster v. Charles*, 6 Bing. 396; *S. C.* 7 Bing. 105; 2 Kent, Comm. Lect. 39, p. 490; *Vernon v. Keys*, 12 East, R. 637; 1 Story, Eq. Jurisp. § 202, 203; *Pothier, Contrat de Vente*, n. 210; *Fellowes v. Lord Gwyder*, 1 Russ. & Mylne, R. 83; *Hughes v. Sloan*, 2 Arkansas R. 146.

⁴ *Ibid.*; *Fellowes v. Lord Gwyder*, 1 Russ. & Mylne, R. 83; *Taylor v. Fleet*, 4 Barb. Sup. Ct. R. 95.

⁵ 1 Story, Eq. Jurisp. § 192; 2 Kent, Comm. Lect. 39, p. 484; *Laidlaw v. Organ*, 2 Wheat. R. 195; 1 Dow, Parl. R. 272; 3 Black. Comm. 165; *Neville v. Wilkinson*, 1 Bro. Ch. R. 546; *Chesterfield v. Janssen*, 2 Ves. R. 155; *Corbett v. Brown*, 8 Bing. R. 35; 5 Car. & Payne, 363; *Polhill v. Walter*, 3 Barn. & Adolph. 114.

because it would in effect be a fraudulent misrepresentation, although it might be strictly true to the letter.

§ 168. So, also, if any trick be played upon the buyer, or any artifice be used, by which he is circumvented and deceived into making a contract different from what he intended, it cannot be enforced against him. Thus, where A agreed to buy a horse, and to give a barley corn for the first nail, and double it for every nail in the horse's shoes, and an action was brought for the price of the horse, it was held, that a bargain in such terms was void, and the jury were ordered to give the plaintiff the mere value of the horse as damages.¹

§ 169. The misrepresentation should, also, be of such a nature, that the party deceived had a right to rely upon it as an actual and undisputed fact ; for if it be in respect to a mere matter of opinion or belief, and no personal confidence or special trust arise from the relationship of the parties, it will not vitiate the agreement, although it be made for the purpose of deception.² The reason of this rule is, that it would be almost impossible, in any case, to arrive by evidence at the precise opinion of the party making the representation ; and, besides, if a representation be made as one of opinion or belief merely, the party to whom it is made ought to take the risk if he rely upon it as being a fact. Ordinarily, therefore, mere expressions of opinion or belief in reference to the subject-matter of a sale, however false they may be, are not considered as fraud.³ Thus, the common language of commendation, and

¹ *James v. Morgan*, 1 Lev. 111.

² *Vernon v. Keys*, 12 East, R. 637, 638 ; *Trower v. Newcombe*, 3 Meriv. R. 701 ; *Scott v. Hansom*, 1 Simons, R. 13 ; *Fenton v. Browne*, 14 Ves. R. 144 ; *Davis v. Meeker*, 5 Johns. R. 354 ; *Hervey v. Young*, Yelv. R. 21 ; 2 Kent, Comm. Lect. 39, p. 484 to 487 ; 1 Story, Eq. Jurisp. § 199 ; *Collins v. Evans*, 5 Adolph. & Ell. N. S. 804 to 820 ; *Stebbins v. Eddy*, 4 Mason, R. 414.

³ *Ibid.* See Post, § 170, 171.

the extravagant puffing of goods, and the exaggerated declarations of auctioneers, and vague general representations as to the value of the subject-matter of sale,¹ are not treated as frauds, however false and deceptive they may be, provided that the article be entirely open to the observation of the purchaser, for he is then supposed to trust his own judgment.² If, however, the character and quality of the goods be disguised; or, if any secondary artifice be employed to aid the deception;³ as, if the windows be darkened so as to prevent examination; or, if certain parcels or packages be shown of better quality than the rest for examination, but not as technical samples, and the piece or pieces sold do not correspond thereto; or, if improper means be employed to enhance the price,—as, if puffers or by-bidders be employed at auction sales, the sale would be void.⁴

§ 169 *a*. But an expression even of belief or opinion, known by the utterer to be false, and intended to mislead the other party, will, if it actually do mislead him, to his injury, be

¹ *Anderson v. Hill*, 12 Smedes & Marsh. 679.

² 2 Kent, Comm. Lect. 39, p. 485; 1 Story, Eq. Jurisp. § 201; *Atwood v. Small*, 6 Clark & Finnell. R. 232, 233; *Vernon v. Keyes*, 12 East, R. 637. The same rule is adopted in the Roman Law. *Ea quæ commendenda causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant; veluti si dicat servum speciosum, domum bene ædificatam. At si dixerit, hominem literatum, vel artificem, præstare debet; nam hoc ipso pluris vendidit.* Dig. Lib. 18, tit. 1, l. 43; *Jendwine v. Slade*, 2 Esp. R. 572.

³ 1 Story, Eq. Jurisp. § 201; 2 Kent, Comm. Lect. 39, p. 484; *Turner v. Harvey*, Jacob, R. 178; *Bromley v. Alt*, 3 Ves. R. 624; *Smith v. Clarke*, 12 Ves. R. 483; *Twining v. Morrill*, 3 Bro. Ch. R. 330; *Marquis of Townshend v. Stangroom*, 6 Ves. R. 338; *Bexwell v. Christie*, Cowp. R. 385; *Pickering v. Dowson*, 4 Taunt. R. 785; *Ward v. Center*, 3 Johns. R. 271; *Upton v. Vail*, 6 Johns. R. 181; *Russell v. Clark*, 7 Cranch, R. 92; *Adams v. Paige*, 7 Pick. R. 542; *Pierce v. Jackson*, 6 Mass. R. 242; *Whittier v. Smith*, 11 Mass. R. 211; *Moore v. Tracey*, 7 Wend. R. 229.

⁴ *Ibid.* See also *Twyne's case*, 3 Rep. 81 a.

treated in equity as a fraud. Thus, where the vendor of a note asserted that he believed the maker to be responsible, when, in fact, he knew him to be not responsible, it was held that the statement of opinion was, under the circumstances, equivalent to a direct assertion, by which the vendor rendered himself liable.¹

§ 170. So, also, there are cases wherein one party is an expert, and knows that the other party places special trust and confidence in his opinion, and, nevertheless, he artfully states a false opinion for the purpose of misleading the other party, in which the agreement would be held to be void on account of fraud.² As, if a person having peculiar skill and judgment in pictures, should falsely state, that he believed a particular picture, which he sells, to be a work of one of the great masters, and upon faith in such representation, it should be bought, the purchaser would be entitled to avoid the sale.³ But the cases to which this modification applies, are mostly those in which the value of the subject-matter of sale depends upon taste or whim; and to which the opinion of an expert might add or detract value. The misrepresentation should, of course, be a material inducement of the purchase, and should be the cause of injury to the vendee. The safest course for the purchaser to pursue on all occasions where he distrusts his own judgment, is to require a warranty of the goods from the vendor, for then the latter will be bound by his representations.

§ 171. But in all cases of this kind, the seller must be care-

¹ *Foster v. Swasey*, 2 Woodb. & Minot, 225. See, also, *Stebbins v. Eddy*, 4 Mason, R. 423; *Smith v. Babcock*, 2 Woodb. & Minot, 246.

² 1 Story, Eq. Jurisp. § 198; 1 Pothier on Oblig. n. 17 to 20, and note (a); *Atwood v. Small*, 6 Clark & Finnell. 232; *Smith v. Babcock*, 2 Woodb. & Minot, 246; *Foster v. Swasey*, 2 Woodb. & Minot, 217.

³ *Ibid.*; *Lomi v. Tucker*, 4 Car. & Payne, 15; *Power v. Barham*, 4 Adolph. & Ell. 473; S. C. 6 Nev. & Mann. 62; 7 Car. & Payne, 356; *Hill v. Gray*, 1 Stark. R. 352; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343.

ful to state his opinion merely as an opinion, and not as a fact, or he will be liable. If a representation be made by the seller at the time of the sale, in respect to the thing sold, it is a question for a jury to determine, whether it was made by him as a part of the contract of sale, or was merely an expression of opinion, and received as such by the vendee. For if the representation be false, and operated injuriously to deceive the vendee, and upon faith of it, the purchase be made, it constitutes a warranty that the thing sold corresponds to the representation. Thus, where A sold to B, for £95, two pictures, representing them as "a couple of Pousson's," and they were, in fact, only copies, it was held, that it was for the jury to determine whether B believed, from the representation by A, that they were originals, and that if they found that he did, he was not bound to pay the price agreed upon.¹ So, also, where A falsely represented to B that a steam engine was fit for mining purposes, and was in good order, and had been so certified by engineers, and that it had been free from rust, and B was thereby deceived; it was held, that, inasmuch as these representations related to matters of fact, and not of mere opinion, and had a tendency to prevent B from inquiring into the condition of the engine, they vitiated the contract.²

§ 172. Again, if a false representation be made in regard to an *extrinsic* fact bearing upon the contract, but not of such a nature as to give the other party a legal right to place reliance upon it, it would not, at law, be such a fraud as to vitiate the contract. Thus, where a party, in making a purchase for himself and his partners, falsely stated to the vendor that his part-

¹ *Lomi v. Tucker*, 4 Car. & Payne, 15; *Power v. Barham*, 4 Adolph. & Ell. 473; *Hill v. Gray*, 1 Stark. R. 352; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343. See Post, §

² *Hazard v. Irwin*, 18 Pick. R. 95. See, also, *Bradley v. Bosley*, 1 Barb. Ch. R. 125; *Smith v. Babcock*, 2 Woodb. & Minot, 246; *Foster v. Swasey*, 2 Woodb. & Minot, 217.

ners would not give more than a certain price for the property, which he was proposing to purchase, it was held that the bargain was not thereby nullified on the ground that it was either a mere false representation of another's intention, or, at most, a *gratis dictum* of the bidder upon a matter which he was under no legal obligation to disclose with accuracy, and on which it was the folly of the seller to rely.¹ But if such a misrepresentation, even of an extrinsic fact, operated materially to influence the mind of the party to whom it was made, and worked an injury to him, a Court of Equity would probably relieve against the contract. At all events, it would refuse to decree a specific performance of an executory contract in such cases, even although it might be unwilling to set aside an executed agreement.²

§ 172 *a*. If a person, in the purchase of an article, make false and fraudulent representations as to his solvency and means of paying therefor, he acquires no right either of property or possession, and the vendor would be justified in retaking the property, provided he could do so without force.³ And if he could not retake them, in such a case, he could either bring an action of assumpsit to recover the value of the goods sold, or an action on the case to recover damages for the deceit.⁴

§ 173. An action will also lie against any third person who knowingly makes a false representation of a material fact, which operates as inducement to a contract; provided that the

¹ *Vernon v. Keys*, 12 East, R. 632. See *Johnson v. Peck*, 1 Woodb. & Minot, 331; *Mason v. Crosby*, 1 Woodb. & Minot, 342.

² 2 Kent, Comm. Lect. 39, p. 486, 487, and note (b), (4th ed.); 1 Story, Eq. Jurisp. § 200; *Buxton v. Lister*, 3 Atk. R. 386; *Atwood v. Small* 6 Clark & Finnell. 232, 330, 395, 444 - 478, 486, 502.

³ *Hodgedon v. Hubbard*, 18 Vermt. (3 Washburn) R. 504; *Johnson v. Peck*, 1 Woodb. & Minot, 334; *Mason v. Crosby*, 1 Woodb. & Minot, 342.

⁴ *Hawkins v. Appleby*, 2 Sandf. Sup. Ct. R. 421.

false statement be of a fact,¹ as then existing, and not otherwise.² As, where a contract was made by A, to deliver live stock at a certain place, to B, and B was persuaded by C, a third person, that A had abandoned all intention of fulfilling the agreement on his part, and he, therefore, bought of C, and A was put to expense and loss of time in bringing his stock to the appointed place, and of otherwise disposing of it; it was held, that an action would lie against C by A, although B might not have been able to enforce the contract against A.³ So, also, where A fraudulently represented the circumstances of B to be good, in order to induce C to give him credit, an action was held to be maintainable by C against A for the misrepresentation.⁴ But in all such cases, the party deceived can only recover against the third person, making a false representation, such damage as is fairly and immediately referable to such misrepresentation.⁵ So, if the fraud of a third person be connived at, and known to neither of the parties, as between the original parties, the party who trusted to his representations should bear the loss, according to the rule that when one of two innocent persons must receive injury, he whose act occasioned it should bear it.⁶ But where a representation in respect to a contract is made to either party by a third person, such

¹ *Hutchinson v. Bell*, 1 Taunt. R. 685; *Hamar v. Alexander*, 2 Bos. & Pull. N. R. 241; *Pasley v. Trueman*, 3 T. R. 51; 2 Kent, Comm. Lect. 39, p. 489, and cases cited; *Eyre v. Dunsford*, 1 East, R. 318; *Allen v. Addington*, 7 Wend. R. 9; *Foster v. Charles*, 6 Bing. R. 396; *S. C.* 7 Bing. R. 105; 4 *Moore & Payne*, 61, 741.

² *Haycraft v. Creasy*, 2 East, R. 92; *Gallagher v. Brunel*, 6 Cowen, R. 346.

³ *Benton v. Pratt*, 2 Wend. R. 385.

⁴ *Hamar v. Alexander*, 2 Bos. & Pull. N. R. 241.

⁵ *Corbett v. Brown*, 5 Car. & Payne, 363; *S. C.* 1 *Moore & Scott*, 85; 1 *Mood. & Rob.* 108.

⁶ *Lickbarrow v. Mason*, 2 T. R. 70; *Goodman v. Eastman*, 4 N. Hamp. R. 455; *Root v. French*, 13 Wend. R. 572; *Lane v. Borland*, 2 Shepley, R. 77.

third person is not liable, if it appear to have been made in good faith, and with a belief in the truth of it.¹

§ 174. *Concealment.*—Concealment of a fact is never considered as fraudulent, unless there be a legal or equitable obligation on the part of the person concealing it to divulge it, growing out of some express or implied trust in the party concealing it. The omission to comply with a merely honorary or purely moral obligation, however repugnant it might be to honor and conscience, does not, of itself, furnish a sufficient ground to set aside a contract; for the law cannot stake within its boundaries, the whole breadth of the moral law; and although it will never help injustice or countenance the slightest immoralities, yet it must leave many duties to the honor and conscience of the individual.² Thus, it has been held, that if A, knowing that there is a mine in the land of B, of which B is ignorant, purchase the land, concealing the fact, the sale would be binding; because, however repugnant such a concealment might be to a nice sense of honor, he was under no legal obligation to divulge the fact.³ If, however, B had suspected the fact, or had inquired whether A expected to derive any peculiar profit from the land, and B had misled him in the least particular relating to the existence of the mine, a Court of Equity would set aside the contract.⁴

§ 175. So, also, in the case of sales of personal property, if the vendee have private information with regard to any extrinsic

¹ *Shrewsbury v. Blount*, 2 Mann. & Grang. 475; *S. C.* 2 Scott, N. R. 588; *Haycraft v. Creasy*, 2 East, R. 92; *Scott v. Lara*, Peake, R. 225; *Ashton v. White*, Holt, N. P. R. 387; *Tapp v. Lee*, 3 Bos. & Pull, 367.

² 1 Story, Eq. Jurisp. § 204, 205, 206; 2 Kent, Comm. Lect. 39, p. 481; *Pidcock v. Bishop*, 3 Barn. & Cres. 605; *Fox v. Mackreth*, 1 Bro. Ch. R. 420; *Turner v. Harvey*, 1 Jacob, R. 178.

³ *Fox v. Mackreth*, 1 Bro. Ch. R. 420.

⁴ *Pidcock v. Bishop*, 3 Barn. & Cres. 605.

fact or event, which materially affects the value of the subject-matter of sale, he would not be legally bound to divulge it, unless a special trust were either expressly or impliedly reposed in him.¹ Thus, if he should have news of peace, during the supposed existence of war; or, of a great rise in the foreign market, and he should, concealing his knowledge, buy articles, the value of which would be greatly enhanced by such a fact, of a person ignorant thereof, the sale would be good. Such cases are, however, closely scrutinized, and it behooves a person taking such an advantage to be curiously careful lest he say any thing, which is calculated in the slightest degree to mislead, for the smallest fraud is sufficient to poison a contract.²

§ 176. So, also, in a contract of sale, if the vendor knowingly allow the vendee to be deceived in respect to the subject-matter of the sale, his silence will, under certain circumstances, be considered fraudulent; for although the vendor is not bound to give the vendee all information which he possesses, yet he is not, therefore, to be permitted to be silent when his silence operates virtually as a fraud. Thus, where the agent of the vendor of a picture, knowing that the vendee labored under a delusion with respect to it, which materially influenced his judgment, permitted him to make the purchase without removing that delusion, the sale was held to be void.³ So, also, if a man knowing himself to be insolvent, and incapable of making payment, purchase goods of another, who is ignorant of any change in his circumstances, and who sells under the most implicit belief in the good faith and sol-

¹ *Laidlaw v. Organ*, 2 Wheat. R. 178; *Fox v. Mackreth*, 1 Bro. Ch. R. 420; *Turner v. Harvey*, Jacob's R. 178; 1 Story, Eq. Jurisp. § 207, 208. See Post, §

² The same rule applies in the Civil Law. See Pothier, *Contrat de Vente*, § 242, 297, 298, 299; *Turner v. Harvey*, 1 Jacob, R. 169.

³ *Hill v. Gray*, 1 Stark. R. 352; *Turner v. Harvey*, 1 Jacob, R. 169; *Matthews v. Bliss*, 22 Pick. R. 53.

vency of the buyer, the concealment would be a direct fraud, for which relief would be granted in equity, or trover be sustained at law.¹ And this rule will especially apply to cases, where the vendee purchases with a preconceived design of not paying for the goods; for this is a manifest and direct fraud.²

§ 177. Again, if a party, not standing in any relation of trust, have knowledge of material facts relating to the subject-matter of sale, he must be careful to do nothing to prevent the other from making investigation; for if there be any studied efforts on his part, to prevent the other from coming to any knowledge relating to the sale, and, especially, if there be any false suggestion or representation, however slight, the transaction will be fraudulent and void.³

§ 178. Cicero has much considered the question, whether a corn merchant having arrived at Rhodes during a season of scarcity, and knowing that other vessels laden with grain are on the point of arriving, acts fraudulently in concealing such fact, for the purpose of selling his cargo at a higher price. Upon this question, he quotes the opinion of Diogenes, who thought that such a concealment was justifiable; and of Antipater, with whom Cicero agrees, who thought that it was in bad faith.⁴ Pothier has examined and commented upon the

¹ *Earl of Bristol v. Wilmore*, 2 Dowl. & Ryl. 755; S. C. 1 Barn. & Cres. 519; *Conyers v. Ennis*, 2 Mason, R. 239. See Post, § 293; *Rowley v. Bigelow*, 12 Pick. R. 311. A different doctrine has been held in Maine. *Cross v. Peters*, 1 Greenl. R. 376; *Irving v. Motley*, 7 Bing. R. 543; S. C. 5 Moore & Payne, 380; *Lloyd v. Brewster*, 4 Paige, Ch. R. 537; *Ferguson v. Carrington*, 9 Barn. & Cress. 59; *Hogan v. Shee*, 2 Esp. N. P. C. 523; *De Symons v. Minchwich*, 1 Esp. R. 428; *Read v. Hutchinson*, 3 Camp. R. 352; *Hodgedon v. Hubard*, 18 Vermont, (3 Washburn) 504.

² *Ibid.*; *Earl of Bristol v. Wilmore*, 2 Dowl. & Ryl. 755; *Stevenson v. Hart*, 4 Bing. R. 476; *Irving v. Motley*, 5 Moore & Payne, 380.

³ *Matthews v. Bliss*, 22 Pick. R. 53.

⁴ *Cicero de Officiis*, Book 3.

opinion of Cicero, and dissents therefrom; considering that the doctrine would be doubtful even in the forum of conscience, but could not be enforced in the exterior forum.¹

§ 179. Again, the rule is different in respect to the concealment of intrinsic qualities of the subject-matter, appertaining to its nature, and character, and condition, such as natural defects; and extrinsic circumstances affecting its value, or operating as inducement to the purchase, — such as the state of the market; or the amount of the duties. In respect to extrinsic circumstances, the rule is, as we have seen,² that no mere concealment in respect thereto constitutes such a fraud as to nullify the contract;³ although, in such cases, it behooves one party to be careful not to do any positive act; or to say any thing calculated to deceive and mislead the other; or to prevent him from acquiring knowledge of any material facts; or the contract will not be binding.⁴ So, also, he must be careful not to be

¹ Pothier, *Contrat de Vente*, n. 242. Pothier asks, whether we ever think of accusing Joseph of injustice in taking advantage of the knowledge which he had of the years of barrenness, to cause Pharaoh to buy the fifth part of the corn of his subjects, without informing them of those years of sterility, which were about to come. But because Joseph did so, it is not thereby proved, that such an act was in the highest degree moral.

² Ante, § 175.

³ Ibid.; *Laidlaw v. Organ*, 2 Wheat. R. 123; *Blydenburgh v. Welsh*, Baldwin, C. C. R. 331; *Calhoun v. Vecchio*, 3 Wash. C. C. R. 165.

⁴ 2 Kent, *Comm. Lect.* 39, p. 478, 479; 2 Black. *Comm.* 451. The same rule obtains in the Scottish Law, (*Brown on Sales*, § 219; *Ersk.* p. 486.) But by the Roman Law, (*Pothier de Vente*, n. 234, 235; *Dig. Lib.* 18, tit. 1, l. 43, § 2), the utmost good faith is required, and any concealment or misrepresentation in relation to the subject-matter, which influences the decision of the party acting ignorantly, vitiates the contract. The rule especially applies to sales, and both vendor and vendee are mutually required to disclose all such information as they possess which would affect the bargain, whether their knowledge be in respect of an intrinsic or an extrinsic fact. But this rule has not been adopted in the Civil Law of France, which follows the doctrine of the Common Law, as stated in the text. Pothier, *Contrat de Vente*, § 239.

silent under circumstances which give his silence the character or force of representation ; as if he know that the other party proceeds upon the supposition of the existence of a fact which he knows not to exist, and which is essential to the contract ; or if he be silent when his silence amounts to assent to certain false propositions ;¹ for in such case, the contract will be void. But in respect to intrinsic qualities, the rule is different ; and, in such cases, mere concealment will, under certain circumstances, constitute a fraud, which will vitiate the sale, although, ordinarily, the maxim of *caveat emptor* also applies. The rule in respect to concealment of intrinsic qualities seems to be, that mere silence on the part of the seller, concerning such defects as the vendee might, by the exercise of proper caution, discover, will not avoid the contract, provided that the goods be open to his examination ; and provided that no special trust or confidence be expressly created between the parties, or be implied from the circumstances of the case.² But any concealment by the vendor of latent defects, known by him to exist, but which the vendee could not, by the exercise of proper diligence, have discovered, will be a fraud upon the vendee, which will avoid the contract.³ But whether the defects be latent or not, if the concealment of intrinsic qualities be made by a party who stands in a relation of trust, or in a fiduciary character, the contract will be voidable, unless the utmost good faith exist ; and any misrepresentation, or concealment, or artifice of any kind, by which either party is injured, will furnish a good ground in equity to set aside the

¹ *Conyers v. Ennis*, 2 Mason, R. 239 ; Ante, § 176.

² *Bluett v. Osborne*, 1 Stark. R. 384 ; *Gardiner v. Gray*, 4 Camp. R. 144 ; *Laing v. Fidgeon*, 6 Taunt. R. 108 ; *Jones v. Bright*, 5 Bing. R. 535 ; *Brown v. Edgington*, 2 Man. & Grang. 279.

³ *Mellish v. Motteaux*, Peake, N. P. C. 115 ; *Baglehole v. Walters*, 3 Campb. R. 154 ; *Schneider v. Heath*, 3 Camp. R. 506 ; *Bywater v. Richardson*, 1 Adolph. & Ell. 508 ; S. C. 3 Nev. & Man. 752. See Post, § 374 ; *English Law Mag.* Vol. 3, p. 191 ; *Jones v. Bowden*, 4 Taunt. R. 847.

contract.¹ We shall, also, see hereafter, that in respect to intrinsic qualities, silence or concealment on the part of a vendor, will import a warranty in many cases.²

§ 180. A distinction may, however, exist in such cases between contracts, which are executed, and those which are executory ; for although a Court of Equity might refuse relief to the injured party, where the contract was wholly performed, yet it might refuse to enforce a specific performance of an executive contract, made under such circumstances.³ So, also, if it were a case without the purview of equity, it being susceptible of accurate adjustment by damages at law, a jury might well refuse more than nominal damages.

§ 181. But if either party be under a legal or equitable obligation, to give all his information in respect to the matter, or, if there be any relation between the parties, creating a special trust or confidence, a concealment of a material fact would be fraudulent.⁴ Thus, if a vendor should sell an estate, to which he knew that he had no title, but of which he was in possession ;⁵ or, if he should sell goods or land, which he knew to be mortgaged, without giving information thereof to the pur-

¹ 1 Story, Eq. Jurisp. § 214, *et seq.* ; *Martin v. Morgan*, 1 Brod. & Bing. 289 ; *Pidcock v. Bishop*, 3 Barn. & Cres. 605 ; 2 Kent, Comm. Lect. 39, p. 483, 488, note, (4th ed.) ; *Lindenau v. Desborough*, 8 Barn. & Cres. 586, 592 ; *Walker v. Symonds*, 3 Swanst. R. 62 ; *Etting v. Bank of U. States*, 11 Wheat. R. 59.

² See Post, § 348 *Warranty*.

³ 1 Story, Eq. Jurisp. § 206 ; 2 Kent, Comm. Lect. 39, p. 490, 491 ; *Ellard v. Llandaff*, 1 Ball & Beat. 250 ; 2 Story, Eq. Jurisp. § 693, 769, 770.

⁴ *Arnott v. Biscoe*, 1 Ves. R. 95, 96 ; *Pothier de Vente*, n. 290, 298, 299 ; *Pilling v. Armitage*, 12 Ves. R. 78 ; 1 Story, Eq. Jurisp. § 208 ; *Hill v. Gray*, 1 Stark. R. 352.

⁵ *Arnott v. Biscoe*, 1 Ves. R. 95.

chaser;¹ or, if he should sell a house, which he knew to be burned down;² the sale would be considered as fraudulent. So, also, in a sale at auction, in which the article sold is professedly offered to the public for sale to the highest bidder, the employment of unlimited by-bidders or puffers, of whom the actual bidders had no notice, would be fraudulent; because it would be an improper concealment of a material fact for the bidders.³ So, also, in cases of insurance, if the assured do not disclose to the insurer, all material facts connected with the subject-matter of insurance, the contract of insurance will be void, although his silence have been in good faith, and without any intention to deceive; or, although he were ignorant of the fact concealed; because the insurer has a right to be informed of all material facts.⁴

§ 182. These are but illustrations, however, of the doctrine relating to cases of fraud. Fraud itself cannot be embraced in any formula; it is multiform, and variable, eluding a definition, and yet palpable whenever it occurs. It is, therefore, most properly undefined by law, and to be detected wherever it appears. There is one class of cases, however, which it is proper here to notice, in respect to which the law is peculiarly scrutinizing; namely, cases where contracts are made with persons of weak intellect, or whose minds are enfeebled by disease. In respect to this class of cases, the law will raise a presumption of fraud from circumstances indicative of any over

¹ *Arnott v. Biscoe*, 1 Ves. R. 95.

² *Pothier, Contrat de Vente*, n. 4.

³ See *Post*, § 482; *Conolly v. Parsons*, 3 Ves. R. 625, note; *Bramley v. Alt*, 3 Ves. R. 622; *Smith v. Clarke*, 12 Ves. R. 481.

⁴ *Lindenau v. Desborough*, 8 Barn. & Cres. 586; *Maynard v. Rhode*, 5 Dowl. & Ryl. 266; *S. C.* 1 Car. & Payne, 360; *Everett v. Desborough*, 5 Bing. R. 503; *Elton v. Larkins*, 5 Car. & Payne, 86; *Duckett v. Williams*, 2 Crompt. & Mees. 348; *Swete v. Fairlie*, 6 Car. & Payne, 1; *Morrison v. Muspratt*, 4 Bing. R. 60.

influence exerted, or any advantage improperly taken ; when, if the case were one of a strong-minded person, no such presumption would arise.¹ Thus, where A, being eighty-three years of age, was entitled to the annual produce of a fund of the value of £6000 during his life, and he executed a deed, assigning all his right therein to his daughter and her husband,

¹ *Blachford v. Christian*, 1 Knapp, R. 77. In this case Lord Wynford said : "The law will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no Court of Justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property ; indeed, from the fluctuation in prices, owing principally to the gambling spirit of speculation that unhappily now prevails, it would be difficult to determine what is an inadequate price for any thing that is sold ; at the time of the sale, the buyer probably calculates on a rise on the value of the article bought, of which he would have the advantage ; he must not therefore complain if his speculations are disappointed, and he becomes a loser instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood ; a bargain, therefore, into which a weak one is drawn under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man. If this conveyance could be impeached on the ground of the imbecility of Fitzsimmons only, a sufficient case has not been made out to render it invalid ; for the imbecility must be such as would justify the jury, under a commission of lunacy, in putting his property and person under the protection of the Chancellor ; but a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed." See, also, *Gardside v. Isherwood*, 1 Bro. Ch. R. App. 560, 561 ; 1 Story, Eq. Jurisp. § 234 to 238, and cases cited ; *Malin v. Malin*, 2 Johns. Ch. R. 238 ; *Huguenin v. Basley*, 14 Ves. R. 290 ; *Ball v. Manning*, 3 Bligh, R. 1, N. S. ; *Bennett v. Wade*, 2 Atk. R. 325, 329 ; *Osmond v. Fitzroy*, 3 P. Wms. R. 130 ; *Ex parte Allen*, 15 Mass. R. 58 ; *M'Diarmid v. M'Diarmid*, 3 Bligh, N. S. 374. See also, ante, § 11.

to whom the reversion belonged, in consideration of an annuity of £10 a year ; and in a suit instituted to reduce the deed, it was admitted, that the assignor was very weak and infirm, and addicted to intoxication ; and it also appeared, that the deed was drawn up by the agents of the daughter and her husband, and that no agent or person was employed on the part of the father ; under these circumstances, it was held, that the deed was void, on the ground of over influence.¹

§ 182 *a*. So, also, contracts made by trustees or guardians with their wards or *cestui que trust*, when they were just come of age, will be carefully scrutinized, and if it appear, that over influence was exerted, and that there was no real consideration — and especially if there were misrepresentation or advantage taken of weakness of purpose, relief will be granted in equity.²

¹ M'Diarmid *v.* M'Diarmid, 3 Bligh, N. S. 374. See also, Farnam *v.* Brooks, 9 Pick. R. 212. Hunt *v.* Moore, 2 Barr, R. 105.

² Taylor *v.* Taylor, 8 Howard, Sup. Ct. R. 153.

CHAPTER V.

THE SUBJECT OF SALE.

§ 183. HAVING already seen what parties are competent to make the contract of sale, and the mode in which their assent thereto must be reciprocally given, the next consideration that requires attention, relates to the subject of sale. For, there being competent parties, mutually desirous of buying and selling, the question which arises between them must be, whether the subject-matter concerning which they wish to contract can be sold.

§ 184. A present sale can be made only of a subject having an actual or possible existence. If, therefore, the subject of the sale do not exist at the time of the sale, no contract will arise; as, if A sell his horse, or house, or certain merchandise, to B, upon the supposition, that they are *in esse*, when in fact the horse is dead, or the house or merchandise is utterly destroyed by fire. If, however, the thing sold be only partially destroyed at the time of the sale, the buyer may either abandon the contract, or he may take the thing at a proportional reduction of the price, according to the terms of the original bargain.¹

¹ *Curtis v. Hannay*, 3 Esp. R. 82; 2 Kent, Comm. Lect. 39, p. 469. The same rule has been adopted in the French Law. Si au moment de la vente la chose vendue était périe en totalité, la vente serait nulle. Si une partie seulement de la chose est périe, il est au choix de l'acquéreur d'abandonner la vente ou de demander la partie conservée, en faisant déterminer le prix par la ventilation. Code Napoleon, No. 1601. So, also, in the Scottish

§ 185. So, also, although the subject of sale have no present existence, yet if it be the natural product, or expected increase of some thing, to which the seller has a present vested right, the sale will be good. Thus, a valid sale may be made of the wine that a vineyard is expected to produce; or the grain, that a field is expected to grow; or the milk, that a cow may yield during the coming year; or the future young, that shall be born of the sheep, owned by the vendor at the time of the sale; or the wool, that shall grow upon them.¹ And in such a case the owner of the principal thing may retain the general property in the thing produced, unless there be fraud in the contract. So,

Law. Brown on Sales, § 134. See, also, Post § . In *Farrar v. Nightingal*, 2 Esp. R. 639, Lord Kenyon said: "I have often ruled, that where a person sells an interest, and it appears that the interest, which he pretended to sell, was not a true one; as, for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end; and bring an action for money had and received, to recover back any sum of money he may have paid in part performance of the agreement for the sale; and though it is said here, that, upon the mistake being discovered in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case. It is sufficient for the plaintiff to say, that is not the interest which I agreed to purchase." By the Roman law, the vendee was obliged to take the thing sold, unless half of it was destroyed. The Dig. Lib. 18, tit. 1, De Contrahenda emptione, § 57, says: "Domum emi quum eam et ego, et venditor combustam ignoraremus; Nerva, Sabinus, Cassius, nihil venisse, quamvis area maneat, pecuniamque solutam condici posse aiunt. Sed si pars domus maneret, Neratius ait, hanc quæstionem multum interesse, quanta pars domus incendio consumptæ permaneat, ut si quidem amplior domus pars exusta est, non compellatur emptor perficere emptionem; sed etiam quod forte solutum ab eo est, repetet. Sin vero vel dimidia pars, vel minor quam dimidia exusta fuerit, tunc coarctandus est emptor venditionem adimplere, æstimatione viri boni arbitrato habita, ut quod ex pretio propter incendium decrescere fuerit inventum, ab hujus præstatione liberetur."

¹ *Grantham v. Hawley*, Hob. R. 132; 2 Story, Eq. Jurisp. § 1040, 1040 b, 1055; *Langton v. Horton*, 1 Hare, R. 556; *Trull v. Eastman*, 3 Metc. R. 121; *Clapman v. Moyle*, 1 Lev. R. 155; *Wood & Foster's case*, 1 Leon. R. 42; *Carter v. James*, 9 Johns. R. 143; *Smith v. Atkins*, 18 Vermont, (3 Washb.) 461.

also, an expectation dependent on chance may be sold, as, where a fisherman agrees to sell the casting of his net, before casting it.¹ This kind of sale, which is called in the Roman law *spei emptio*, gave rise to the celebrated controversy related by Plutarch in the Life of Solon, and which grew out of the following circumstances: "When some Coans were drawing a net, certain strangers from Miletus bought the draught unseen. It proved to be a golden tripod, which Helen, as she sailed from Troy, is said to have thrown in there, in compliance with an ancient oracle. A dispute arising at first between the strangers and the fishermen about the tripod, and afterwards extending itself to the states to which they belonged, so as almost to engage them in hostilities, the priestess of Apollo took up the matter, by ordering that the wisest man they could find should have the tripod." This summary disposition of the case by the priestess, undoubtedly served to settle the dispute, but it was scarcely in accordance with the rules of either the Roman or the Common Law. The contract was intended by both parties to refer only to the fish, which should be taken, and as every contract is to be interpreted according to the intent of the parties, the tripod was not included in the sale, and, therefore belonged to the fishermen. The sagacity and craft of the priestess met its reward, however, for, after ineffectual attempts to discover the wisest man, the tripod was sent to the temple of Apollo, at Delphi.

§ 186. But a mere possibility or contingency, not dependent upon any present right, nor resulting from any present property or interest, cannot be made the subject of a present sale, though it may be of an executory agreement to sell.² Thus, a person

¹ Pothier, *Contrat de Vente*, n. 6.

² *Lunn v. Thornton*, 1 Mann. & Grang. N. S. 379; 2 Kent, *Comm. Lect.* 39, p. 468, n. (b.); Pothier, *Contrat de Vente*, n. 5, 6; *Grantham v. Hawley*, Hob. R. 132; *Harg. Co. Litt. lib. 1*, n. 363; *Robinson v. McDonnell*, 5 Maule & Selw. 228; *Com. Dig. tit. Grant, B*; *Cazeton v. Leighton*, Meriv. 667;

cannot make a present sale of all the wool, that may grow upon sheep, which he may hereafter buy;¹ nor of any other thing, in which his interest is wholly prospective and doubtful. So, also, a mere expectancy of succession, or inheritance, can only be the subject of an executory agreement.² But a contingent future expectation founded upon a right,—as a reversionary interest founded on a settlement or entailment,—may be sold.³ So, also, a trader cannot make a present sale of goods, in which he has no present right of property; but which he intends to go into the market and buy.⁴ He may, however, agree to sell them, after he shall have bought them. So, also, although a grant of goods not belonging to the grantor at the time of executing the deed, or not in existence, is void, if it stand alone; yet the grantor may subsequently ratify it by some act done by him with that view, after he has acquired the property therein.⁵

Brown on Sales, p. 135, 136. Perkins (Tit. Grant, § 65.) says, “It is a common learning in the law, that a man cannot grant or charge that which he has not.”

¹ Grantham v. Hawley, Hob. R. 132.

² Cazeton v. Leighton, 3 Meriv. R. 667; Earle of Portmore v. Taylor, 4 Simons, R. 182; Gibson v. Jeyes, 6 Ves. R. 266. This is otherwise in the Scottish Law. Bell, Law of Scotland, p. 30.

³ Cazeton v. Leighton, 3 Meriv. R. 667; 2 Kent, Comm. Lect. 39, p. 468, note (d); Carter v. James, 9 Johns. R. 143.

⁴ Bryan v. Lewis, 1 Ry. & Mood. 386; 2 Kent, Comm. Lect. 39, p. 468, n. (d). But see *e contra*, Cud v. Rutter, 1 P. Will. 570. In Bryan v. Lewis, Abbott, Ch. J., said: “I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered at a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods, which he has contracted to deliver, he cannot maintain an action upon such a contract. It amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences.” Bell on Sale, p. 31; 1 Bell, Illust. p. 113.

⁵ Lunn v. Thornton, 1 Mann. & Grang. N. S. 379; Tapfield v. Hillman, 6 Mann. & Grang. 245; S. C. 6 Scott, N. R. 967.

*“Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu.”*¹ In this respect, however, the doctrine of the Common Law differs from the Roman law; for, by the Roman law, there is no distinction between an executory contract of sale and an absolute sale; any agreement to transfer goods on the one side, and to pay therefor on the other, being a complete sale, although no reference be made to the time of its performance, and although the goods to be transferred be not in the seller's possession.²

§ 186 *a*. If goods be sold to which the vendor has no title at the time of the sale, and subsequently he acquire a title before the repudiation of the contract by the other party, the property in the goods, immediately on the acquisition of the title by the vendor, vests in the vendee.³ And where a vendee in a contract of sale had an election within a limited time to recede from the contract and redeem the article, or to complete the purchase, and the vendor had no title to the thing sold at the time of making the contract, but acquired one within the period limited, and the vendee allowed that period to elapse without returning the article, it was held, that he could not, when subsequently sued for the purchase-money, set up a want of consideration for the contract as originally made.⁴

§ 187. It is not necessary, however, that the subject of sale should have a physical and corporeal existence, and be susceptible of manual delivery; for, provided it have an actual value, however intangible it may be, it may nevertheless be sold. Thus, a license to manufacture patented machines; or, a copy-

¹ Bacon's Maxims, Regula. 14.

² Ante, § 2; Bell on Sale, p. 13.

³ Frazier v. Hilliard, 2 Strobb. R. 309; Blackmore v. Shelby, 8 Humphrey, (Tenn.) R. 439.

⁴ Hotchkiss v. Oliver, 5 Denio, R. 314.

right to print and sell a manuscript, even of as incorporeal a substance as poetry, or metaphysics, may be sold. So, also, the good-will of a trade may be bought.

§ 188. The general rule is, that the subject of sale must belong to the vendor, and that he can sell no more than the interest, which he legally possesses.¹ If, therefore, he sell an article not belonging to him, whether it were obtained by theft, or finding, or by any other means without consent of the owner, the person, whose property it is, may claim restitution thereof from the hands of the vendee; although it be sold and purchased *bonâ fide*, and for a valuable consideration; for unless the property were divested from the original owner by a legal and valid sale, or transfer, it would still remain his property, in whatever innocent hands it might subsequently come.² This is especially the case if the vendee know, that the articles purchased are not the legal property of the vendor, or if he have reason to suspect, that such is the fact. The Civil Code of France follows the rule of the Common Law, and enacts, that "*la vente de la chose d' autrui est nulle.*"³

§ 189. By the Roman law, the rule is, however, different. An absolute transfer of title to the article sold is not necessary to constitute a sale, but only a transfer of all the rights of the seller and of the possession of the article sold. A valid sale

¹ See Post, § 200, 423, *et seq.*

² *Peer v. Humphrey*, 2 Adolph. & Ell. 495; Long on Sales, Rand's ed. p. 164, 168; 2 Chitty, Com. Law, 149; *Williams v. Merle*, 11 Wend. R. 80; *Root v. French*, 13 Wend. R. 570; *Mowrey v. Walsh*, 8 Cowen, R. 238; *Trott v. Warren*, 2 Fairf. R. 227; *Hollingsworth v. Napier*, 3 Caines, R. 182; *Haretop v. Hoare*, 1 Wils. R. 8; S. C. 2 Strange, R. 1187; *Everett v. Coffin*, 6 Wend. R. 609; *Buffington v. Gerrish*, 15 Mass. R. 156; *Lowne v. Collins*, 11 Mass. R. 500; *Kinder v. Shaw*, 2 Mass. R. 398; *Dame v. Baldwin*, 8 Mass. R. 519; *Heacock v. Walker*, 1 Tyler, R. 338; *Wheelwright v. Depeyster*, 1 Johns. R. 471.

³ Cod. Nap. art. 1599. See, also, ante, § 2.

therefore can be made by the vendor of property not belonging to him, and which he was not authorized by the real owner to sell.¹ The maxim of the Digest is, "*Hactenus tenetur ut rem emptori habere liceat, non etiam ut ejus faciat.*" By the Roman law, therefore, so long as the vendee remains undisturbed in his possession, he has no action against the vendor for breach of contract, although he discover an utter want of title in him to the goods sold — provided there were no fraud in the case. But the vendor is bound to defend the possession of the vendee against all persons claiming under him.²

§ 190. By the old Common Law, the rule that no one could sell what did not belong to him, was restricted to private sales, and did not apply to sales made in market *overt*, or open market.³ Market *overt* is held in the country only on the special days appointed by charter or prescription; but in London, every day except Sunday, is market day.⁴ So, also, the market place, or spot of ground set apart by custom for the sale of particular goods, is the only *market overt* in the country;⁵ but in London, every shop in which goods are exposed publicly to sale, is market *overt*; but only for such things as the owner professes to trade in.⁶ So, also, the general privilege in London is strictly confined to the precincts of the city, and does not extend to a shop in the Strand.⁷

§ 191. The old rule in respect to sales made in market

¹ Pothier, Contrat de Vente, n. 7, 1.

² Pothier Contrat de Vente, P. 2, Ch. 1, n. 48.

³ 2 Black. Comm. 499; Com. Dig. Market, E; 2 Chitty, Com. L. 148; Cro. Jac. 68; Doug. R. 380; Dyer v. Pearson, 3 Barn. & Cres. 42; Peer v. Humphrey, 2 Ad. & Ell. 495; Hiern v. Mill, 13 Ves. R. 122.

⁴ Ibid.; 2 Inst. 220; Godb. 131.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.; Wilkinson v. King, 2 Camp. 336; Anon. 12 Mod. R. 521; Lyons v. Depass, 9 Car. & Payne, 68.

overt, was, that a sale of property not belonging to the vendor, but being in his possession, was valid if made openly in market *overt*, to a *bonâ fide* purchaser, although the property might have been improperly acquired.¹ There were, however, certain restrictions to this doctrine, and a sale in market *overt* would not give a secure title to the vendee, if the goods were the property of the king; or, if the vendee knew that they were not the property of the vendor, or was guilty of any *malû fides* in respect to the sale.² So, also, no sale in market *overt* was valid unless it were made openly; and if it were made in a back room, or warehouse, or shop, the windows or doors of which are closed up so as to seclude it from public observation; or, between sunset and sunrise; or, where the sale was commenced out of market *overt*; it was not valid.³ So, also, the privilege did not extend to gifts;⁴ nor to sales of pawns, taken to any pawnbroker in London, or within two miles thereof;⁵ and notwithstanding any intervening sales, if the original vendor of property not belonging to him came again into possession of the goods sold, the original owner's right revived.⁶

§ 192. These are, however, mere restrictions and modifications of the rule, but there was one exception, which still obtains upon grounds of public policy, in respect to negotiable instruments. The property in a negotiable instrument passes by transfer and delivery, and the title to it will vest in any person taking it *bonâ fide*, for a valuable consideration, out of

¹ 2 Black, Comm. 449; Bac. Abr. Fairs, (E); Case of Market Overt, 5 Co. R. 83, (b); 2 Inst. 713; Peer v. Humphrey, 2 Adolph. & Ellis, 495; S. C. 1 Har. & Wol. 28; 4 Nev. & Man. 430.

² Ibid.; Long on Sales, Rand's ed., p. 171, 173; Smith's Merc. Law, p. 290; 2 Chitty, Com. Law, 149; 2 Inst. 713, 714.

³ Ibid.; 2 Inst. 713.

⁴ 2 Inst. 713; Smith, Merc. Law, 290; Long on Sales, Rand's ed., 173; Case of Market Overt, 5 Co. R. 83, (b).

⁵ 1 Jac. 1, c. 21.

⁶ 2 Black. Comm. 499.

market overt, — whatever defects may have existed in the title of the person transferring it to him.¹ This exception is, however, confined to instruments strictly negotiable, and taken *bonâ fide*.² Indeed it has been held, that if they be taken under circumstances which ought to have excited the suspicion of a prudent and careful man, the property therein does not pass, so as to deprive the actual owner from recovering.³ But this rule has not been sustained by subsequent decisions, and the transfer would be probably considered good, if no suspicion be actually aroused.⁴

§ 193. By the Roman law of *usucaption*, any one who acquired property *bonâ fide*, either by purchase, or gift, or in any other mode, from the apparent owner, had, after the lapse of a certain time, a perfect and indefeasible right to it, although it may not have belonged to the person from whom he received it.⁵ The same right is also recognized in Plato's laws.⁶ But the Common Law differs in this respect, that it is by the *mode of sale*, and not by the *lapse of time*, that a vendee of personal property, improperly obtained, acquires an indefeasible title even against the real owner.

¹ *Miller v. Race*, 1 Burr. R. 452 ; *S. C. Smith's Lead. Cases* ; *Backhouse v. Harrison*, 5 Barn. & Adolph. 1098 ; *Crook v. Jadis*, 5 Barn. & Adolph. 909 ; *Grant v. Vaughan*, 3 Burr. R. 1516 ; *Snow v. Sadler*, 3 Bing. R. 610 ; *Lawson v. Weston*, 4 Esp. R. 56.

² *Clarke v. Shee*, Cowp. R. 197 ; *Solomons v. Bank of England*, 13 East, R. 135 ; *Gill v. Cabitt*, 3 Barn. & Cres. 466.

³ *Gill v. Cabitt*, 3 Barn. & Cres. 466. See, also, *Snow v. Peacock*, 3 Bing. R. 408 ; *Easly v. Crockford*, 10 Bing. R. 243 ; *Strange v. Wigney*, 6 Bing. R. 677 ; *Down v. Halling*, 4 Barn. & Cres. 330 ; *Beckwith v. Corral*, 4 Bing. R. 444.

⁴ *Crook v. Jadis*, 5 Barn. & Adolph. 909 ; *Backhouse v. Harrison*, 5 Barn. & Adolph. 1098. See, also, *Lawson v. Weston*, 4 Esp. R. 56 ; *Snow v. Saddler*, 3 Bing. R. 610 ; *Foster v. Pearson*, 5 Tyrwh. 262.

⁵ Inst. Lib. 2, tit. 6, l. 1 ; Cod. Lib. 7, tit. 31.

⁶ De Leg. l. 12.

§ 194. This general rule of market overt, was thought to be founded upon public policy, for, says Blackstone,¹ "it is expedient that the buyer, by taking proper precautions, may, at all events, be secure of his purchase, otherwise all commerce between man and man must soon be at an end." But this reason seems one-sided and insufficient, since the rule affords an inducement to theft, by enabling the thief to find an easy market for his goods; and is absolutely unjust, since it deprives the real owner of his property without his consent or fault. It is true, that the person purchasing a stolen article, *bonâ fide*, may be injured by a different rule, but his loss is often the result of his negligence and want of scrutiny; and where it is not, yet, as he has been a party to the fraud or crime, his act has occasioned injury, and he should suffer the loss rather than the actual owner. In such cases, the general maxim applies, that where one of two innocent parties must suffer, he whose act occasions the injury should bear the loss. Indeed, the old rule of the Common Law has been somewhat restricted in its operation in England by statute and by recent decisions. It is now enacted by statute, that the owner of any chattel or other property *stolen*, or fraudulently obtained, is entitled to restitution, although the chattel may have been sold *bonâ fide* in the meantime, provided that the owner or his executor shall prosecute the thief or receiver to conviction.²

§ 195. Under this statute, the owner of goods stolen, or fraudulently obtained from him, and sold by the thief or defrauder to a *bonâ fide* purchaser, may reclaim them by an action in trover after conviction of the thief or defrauder. But before the conviction of the thief or defrauder, no action will lie against the person having possession of the goods, although he receive notice from the owner that they have been stolen.³

¹ 2 Black. R. 449.

² 21 Hen. 8, ch. 11; 7 & 8 Geo. 4, ch. 29, § 57.

³ Horwood v. Smith, 2 T. R. 750; Peer v. Humphrey, 2 Ad. & Ell. 495; Gimson v. Woodfall, 2 Car. & Payne, 41.

Indeed, if, after having received such notice, but before conviction of the thief or defrauder, he should sell them, the remedy of the owner would be against the person to whom they were sold; for the person holding the goods at the time of the conviction of the thief is the only person responsible, and not the various persons through whose hands they may have passed in the intermediate time.¹

§ 196. There is, however, an exception in this statute, by which, "if it appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid, or discharged, by some person, or body corporate, liable to the payment thereof; or, being a negotiable instrument, shall have been *bonâ fide* taken, or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or, without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, or converted as aforesaid, in such case the Court shall not award or order the restitution of such security."

§ 197. Again, it is enacted by statute, in England,² that any person acting in the capacity of agent, or being in the possession of certain documents, generally used as symbols of property; as bills of lading; dock warrants; India warrants; wharfingers' certificate, warrant, or order for the delivery of goods; shall be deemed to be the true owner of the goods described in such documents, so as to give validity to any sale or disposition³ thereof, or of any part; or to the deposit and pledge thereof, or of any part, as a security for any money or

¹ Horwood *v.* Smith, 2 T. R. 750; Peer *v.* Humphrey, 2 Ad. & Ell. 495; Gimson *v.* Woodfall, 2 Car. & Payne, 41.

² 6 Geo. 4, ch. 94.

³ The disposition must be in the nature of a sale. Taylor *v.* Kymer, 3 Barn. & Adolph. 337; Taylor *v.* Truman, 2 Barn. & Adolph. 886.

negotiable instruments; if the buyer, disposer, or pawnée, has not notice, by the document or otherwise, that such person is not the actual and *bond fide* owner of the goods. But a deposit or pledge of goods actually, or by symbol, as security for a preëxisting debt or demand, only transfers the actual interest of the depositor or pledgor.

§ 198. Again, by statute,¹ peculiar provisions restricting the privilege of market *overt*, have been enacted in respect to the sale of horses; rendering it necessary that the horse should be publicly exposed to sale, for one whole hour, in a public place used for such a sale, and not in a private yard or stable; that he should be brought by the parties to the book-keeper of the fair or market; that toll should be paid, if any be due; and if not, one penny should be paid to the book-keeper to make a memorandum of the terms of sale, names of parties, and description of the horse. And such a sale would not avail against the true owner, if, within six months after the horse is stolen, he put in his claim before some magistrate, where the horse shall be found, and within forty days afterwards, prove the horse to be his property by the oath of two witnesses, and tender to the person in possession the price paid by him *bond fide* in market *overt*.

§ 199. The rule relating to sales in market *overt*, by which certain privileges are allowed thereto, which are not granted to private sales, have not generally been enforced in any of the States in the United States.² And, in general cases, the

¹ 2 P. & M. ch. 7; 31 Eliz. c. 12.

² It has been repeatedly affirmed in many decisions in this country, that no market *overt* exists here. Thus, in *Dane v. Baldwin*, 8 Mass. R. 519, where some stolen firkins of butter were sold in Boston Market, it was held, that no property passed, because there was no market *overt* in the Commonwealth. So, also, the same was affirmed in *Towne v. Collins*, 11 Mass. R. 500; and in Pennsylvania, in *Hardy v. Metzgar*, 2 Yeates, R. 347; *Leekey v. McDermott*, 8 Serg. & Rawle, 500; *Hosack v. Weaver*, 1 Yeates,

rule obtains, that no person can make a valid sale of property, to which he has no title, and which he is not authorized by the real owner to sell. There are, however, some exceptions to this rule, which obtain, — First, in respect of negotiable instruments, taken *bonâ fide* for a valuable consideration, which exception is allowed upon grounds of public policy;¹ and, Second, in respect of sales by agents, whom the principal has held out as being possessed of authority to sell, and has thereby enabled to deceive the vendee, — and this exception is allowed because of public necessity, and also because the act of the principal having indirectly occasioned his loss, he must bear the consequences; and, Third, in respect to judicial sales, to which the general rules of market *overt* apply.

§ 199 *a*. Yet, even in the case of negotiable paper which has been lost by the owner, or which has been obtained from him by fraud, or by larceny, the holder thereof cannot retain it as against the rightful owner, where he received it under circumstances which were calculated to throw suspicion upon the right of the person from whom he received it, to dispose of it as his own. For purchasing a security under such circumstances is gross negligence, for which the party guilty of it should suffer, rather than the owner.²

R. 478; and in New York, in *Wheelwright v. Depeyster*, 1 Johns. R. 470; and in Ohio, *Roland v. Gundy*, 5 Hamm. R. 203; and in Vermont, in *Heacock v. Walker*, 1 Tyler, R. 341; and in Maryland, in *Browning v. McGill*, 2 Har. & Johns. 308; and in Maine, in *Griffith v. Fowler*, 18 Vermont, (3 Washburn,) R. 390. It is not, however, strictly true, that no market *overt* exists in this country; since sheriff's sales, and sales made under the probate act of Vermont upon writs of execution, and sales of goods found, and of estrays, and indeed all judicial sales are governed by the rules of market *overt*. See *The Monte Allegre*, 9 Wheat. R. 616; *Heacock v. Walker*, 1 Tyler, R. 341; *Forsythe v. Ellis*, 4 J. J. Marsh. R. 298; *Samms v. Alexander*, 3 Yeates, R. 268.

¹ *Miller v. Race*, Smith's Leading Cas. 259, and cases there cited. *Grant v. Vaughan*, 3 Burr. R. 1516; *Glynn v. Baker*, 13 East, R. 509.

² *Peabody v. Fenton*, 3 Barb. ch. 451.

§ 200. There is, however, a distinction which obtains between cases where sales are made of property, to which the vendor has obtained a title by fraudulent means, and cases where the vendor has no title, and has obtained possession of the goods by felony or chance, or who holds them as a mere bailee. In the former class of cases, where the vendor has obtained his title by fraudulent representations, or artifices, he can make a valid sale of the goods to a *bonâ fide* purchaser for a valuable consideration, so as to deprive the original owner of his power to reclaim them.¹ The reason of this rule is, that where property is obtained with the assent of the real owner, however he may have been deceived, the contract is not void, but only voidable, at the instance of the party deceived. The valid title, therefore, passes to the vendee; subject indeed to the avoidance of the contract by the vendor, but being perfectly good until such avoidance is made. If, then, the vendee should, while in possession of the goods; and before the nullification of the contract by the vendor, sell to a *bonâ fide* purchaser for a valuable consideration, the sale would be binding as against the original vendor. If, however, the sale be without consideration, or be made to a person purchasing with knowledge that they were obtained by fraudulent representations, the original owner may follow the goods, or their proceeds, into the hands of such vendee.² But a person who has obtained goods fraudulently, cannot secure his title by

¹ Hollingsworth v. Napier, 3 Caines, Cas. 182; Mowrey v. Walsh, 8 Cowen, R. 238; Trott v. Warren, 2 Fairf. R. 227; Wheelwright v. Depeyster, 1 Johns. R. 471; Cross v. Peters, 1 Greenl. R. 376; Conyers v. Ennis, 2 Mason, R. 236; Noble v. Adams, 7 Taunt. R. 59; Buffington v. Gerrish, 15 Mass. R. 156; Root v. Trench, 13 Wend. R. 570; Biddle v. Levy, 1 Stark. R. 20; Hill v. Perrott, 3 Taunt. R. 274; Smedley v. Gooden, 3 Maule & Selw. 191; Bradbury v. Anderton, 1 Crompt. Mees. & Rosc. 490.

² Lloyd v. Brewster, 4 Paige, Ch. R. 537; Robinson v. Dauchy, 3 Barb. Sup. Ct. R. 20.

selling them to a *bonâ fide* purchaser and then repurchasing them.¹

§ 201. But where the vendor has acquired possession of goods, without the knowledge, connivance, or assent of the actual owner,—as, where he has stolen or found them; or, where he holds them in a fiduciary capacity, with no express or implied right obtained from the owner to sell, or otherwise to dispose of them,—as, where he is a bailee or trustee; he cannot make a valid sale of them, so as to divest the actual owner of his right to reclaim them from any person having possession of them, although such person may have bought them *bonâ fide*.² The reason, which sustains this rule is, that until the owner either expressly or impliedly agrees to part with his rights of property, or does some act which operates to deceive the vendee into a belief that the vendor has a right to make a sale, his property is never divested from him. Some voluntary act of divestment on his part, or some conduct, from which his assent to the sale is legally implied, is necessary, in order to enable any other person to make a valid sale of his property. But a mere *bonâ fide* purchase of goods, without notice, or reference to the title of the vendor, does not, of itself merely, give an indefeasible title to the vendee.³

§ 202. If, however, the owner place his property in the hands of another person, under such circumstances, or in such

¹ Schutt v. Large, 6 Barb. Sup. Ct. R. 373.

² Williams v. Merle, 11 Wend. R. 80; Everett v. Coffin, 6 Wend. R. 609; Kinder v. Shaw, 2 Mass. R. 398; Haretop v. Hoare, 1 Wils. R. 8; 2 Strange, R. 1187; Wheelwright v. Depeyster, 1 Johns. R. 471; Dame v. Baldwin, 8 Mass. R. 519; Towne v. Collins, 14 Mass. R. 500; Mowrey v. Walsh, 8 Cowen, R. 238; Chism v. Woods, Hardin, R. 531; Robinson v. Dauchy, 3 Barb. Sup. Ct. R. 20.

³ Ibid.; Wheelwright v. Depeyster, 1 Johns. R. 471; Heacock v. Walker, 1 Tyler, R. 338; Covill v. Hill, 4 Denio, R. 327.

a manner, that the law implies a right and power on the part of that person to make a valid sale thereof, the sale by such person will be good, although he have, as between himself and the owner, no such right or power.¹ Thus, where a principal holds out a person as his general agent, but, without giving public notice, which reaches the vendee, limits the powers of his agent to sell under certain circumstances, or below a certain price, and the agent violates his instructions, the sale will be good as far as the vendee is concerned.² In all such cases, the owner is bound, on the ground that his own acts and conduct furnished the opportunity to the vendor to deceive, and operated to induce a false trust on the part of the vendee; and, therefore, an innocent purchaser ought not to suffer for the positive carelessness of the owner.

§ 203. Where there is a total failure of title on the part of the vendor, the vendee may, if the contract be executory and unfulfilled, refuse to perform it, and reclaim any portion of the purchase-money which he may have advanced.³ So, also, if the contract be executed, he may rescind it, and bring an action of money had and received to recover his advances.⁴ But he cannot, where the contract is executed, bring an action on the warranty of title, until such warranty has been broken by an actual action by the true owner, or at least, by suit or

¹ *Irving v. Motley*, 7 Bing. R. 543; S. C. 5 Moore & Payne, R. 380; *Barnes v. Bartlett*, 15 Pick. R. 71. See Post, § 996.

² *Pickering v. Busk*, 15 East, R. 38; *Fenn v. Harrison*, 3 T. R. 760; *Dyer v. Pearson*, 3 Barn. & Cres. 42; S. C. 4 Dowl. & Ryl. 652; *Boyson v. Coles*, 6 Maule & Selw. 23, 24; Story on Contracts, § 284 to 289; Story on Agency, § 73, and note (3,) § 126, 127, and note (1,) § 452; *Morse v. Slue*, 1 Vent. R. 238; S. C. 1 Mod. R. 85; *Attorney Gen. v. Siddon*, 1 Tyrw. 41, 46; *Williams v. Barton*, 3 Bing. R. 145.

³ *Parois v. Rayer*, 9 Price R. 488; *Souter v. Drake*, 5 Barn. & Adolph. 999; *Judson v. Wass*, 11 Johns. R. 528; *Clute v. Robison*, 2 Johns. R. 613. See Post, § 367, b.

⁴ *Morley v. Attenborough*, 3 Welsb. Hurlst. & Gord. (Excheq.) 514; *Far-
rer v. Nightingal*, 2 Esp. R. 619. This rule does not obtain, however, in

adverse claim brought against him, in which his title is assailed.¹ If there were fraud in the case, as if the vendor knew he had no title, and made false representation, the vendee could at once rescind, without waiting for action. Again, where the vendor has only a partial title to the property sold, as if the sale be of goods under mortgage, or incumbrance of any kind, the vendee may avoid the sale, and reclaim the money he has advanced, if the incumbrance materially diminish the value of the goods sold, and go to the essence of the contract.² Thus, where certain parties made an agreement for the purchase and sale of an interest in a public house, which was to have eight years and a half to run, and it turned out that the vendor only had an interest of six years; it was held, that the buyer might treat the contract as a nullity, and recover the purchase-money advanced by him. In this case, Lord Kenyon said: "I have often ruled, that where a person sells an interest, and it appears that the interest, which he pretended to sell, was not a true one, — as, for example, if it was for a lesser number of years than he had contracted to sell, — the buyer may consider the contract as at an end, and bring an action for money had and received, to recover back any sum of money he may

the Roman Law, in which a seller was not understood to warrant his title to the goods sold, but only to agree to defend his possession; nor in the old French Law, which followed the Roman Law. The Code Napoleon, however, has settled the question in France, by declaring, in the 1599th article, that "*la vente de la chose d'autrui est nulle.*" See Pothier Contrat de Vente, No. 1. The meaning of the terms of the Roman Law in relation to this question, has been somewhat discussed in France by the leading writers on Sales, — Pothier, Duranton, Duvergier, Toullier. See Ante, § 7, note 3, § 188. See Post, § 423 – 367, where this subject is more fully considered.

¹ Case *v. Hall*, 24 Wend. R. 103; *Vibbard v. Johnson*, 19 Johns. R. 79; *Brown v. Reeves*, 19 Marl. (Louis.) R. 235. So, also, in the Roman Law, Code Lib. 8, tit. 45, l. 3. See Post, § 367, c.

² 2 Kent, Comm. Lect. 39, p. 469, 470; 2 Story, Eq. Jurisp. § 779; *Paton v. Rogers*, 1 Ves. & Bea. 351; *Graham v. Oliver*, 3 Beav. 124, 128; *Hill v. Buckley*, 17 Ves. R. 394. Post, 367, d.

have paid in part performance of the agreement for the sale; and though it is said here, that upon the mistake being discovered in the number of years of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case. It is sufficient for the plaintiff to say, That is not the interest which I agreed to purchase."¹ But if the purchaser should, nevertheless, elect to keep the goods, he would be entitled to claim a proportional diminution of the price, as a compensation for the reduction in value of the goods.²

§ 203 *a*. In respect to a sale of lands, the rule is different. If there be a fraudulent misrepresentation as to title, the vendee may reclaim his purchase-money even after the contract is executed; but if there be no fraud, he is remitted to the covenants in his deed for his remedy.³

¹ Farrer v. Nightingal, 2 Esp. R. 639; Curtis v. Hanney, 3 Esp. R. 82.

² Johnson v. Johnson, 3 Bos. & Pull. 170.

³ The cases which have tended to embarrass this question, and which seem to have misled Mr. Chancellor Kent (2 Comm. Lect. 39, p. 473,) into the statement, that the same rule applies to sales of chattels and lands, will be found to be wholly cases of sales of land, or of the overruled cases in which it was asserted that no warranty of title is implied in a sale of lands or goods out of possession. It is evident, that in a sale of lands the remedy of the purchaser should be upon the covenants in the deed of conveyance, and that he cannot set up a want of title on the part of the vendor, as a defence to an action against him by the vendor for his notes given as consideration of the purchase, because the notes are *primâ facie* evidence of valuable consideration, (Mandeville v. Welch, 5 Wheat. R. 277,) which can only be rebutted by proof of a *total* failure of title, if it can be rebutted at all. Greenleaf v. Cook, 2 Wheat. R. 13. The cases of Frisbie v. Hoffnagle, 11 Johns. R. 50; Knapp v. Lee, 3 Pick. R. 452; Tallmadge v. Wallis, 25 Wend. R. 117, indicate that even in sales of land, a failure of title is a sufficient defence to an action on a note for the purchase-money. But see contra, Vibbard v. Johnson, 19 Johns. R. 77; Whitney v. Lewis, 21 Wend. R. 132; Lloyd v. Jewell, 1 Greenl. R. 352. A *total* failure of title has been held, however, to be a good defence in Greenleaf v. Cook, 2 Wheat. R. 13.

§ 204. So, also, if the vendor of a number, mass, or quantity of things, can only give a complete title to a part or portion thereof, the vendee would, ordinarily, be entitled to retain the portion, to which the vendor could give a perfect title, receiving an abatement of the price, proportional to the portion, in regard to which the vendor's title was defective.¹ But his right to abandon wholly the contract would depend upon this consideration, whether it were entire and incapable of separation, or whether it were severable or divisible.² If it were an entire contract, that is, if the price were one whole sum, and not a result computed from several lesser sums given for fractions or items of the subject-matter, — as, if a person agree to give one hundred dollars for a bale of goods, — the vendee might treat the sale as void; unless the vendor could give him a perfect title to the whole.³ But if the contract be severable, and susceptible of apportionment on the different items by the terms of the agreement, the vendee would be bound as far as the vendor could give a complete title to the items.⁴ Thus, if a person should buy a horse and a cow together, giving forty dollars for the cow, and one hundred dollars for the horse, and the title of

In respect to a partial failure of title, see *Gray v. Handkinson*, 1 Bay. R. 278; *Reab v. McAlister*, 8 Wend. R. 109; *Day v. Nix*, 9 Moore, R. 159; *Batterman v. Pierce*, 3 Hill, R. 171; *Goodwin v. Morse*, 9 Metcalf, R. 279, which decide that on a partial failure of consideration, the defendant may recoup his damages on the plaintiff's breach of warranty.

¹ *Chambers v. Griffith*, 1 Esp. R. 150; *Roffey v. Shallcross*, 4 Madd. Ch. R. 227; *Dalby v. Pullen*, 3 Sim. R. 29; *Casamajor v. Strode*, 1 Coop. Sel. Cas. 510; S. C. 8 Condén. Ch. R. 516; *James v. Shore*, 1 Stark. R. 426; *Roots v. Dormer*, 4 Barn. & Adolph. 77; *Judson v. Wass*, 11 Johns. R. 525. Post, implied warranty, 367.

² *Ibid.*; *Casamajor v. Strode*, 1 Coop. Sel. Cas. 510; S. C. 8 Condén. Ch. R. 516; *Roffey v. Shallcross*, 4 Madd. Ch. R. 227; 2 Kent, Comm. Lect. 39, p. 470, note (b.)

³ *Ibid.*

⁴ *Ibid.*; *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Miner v. Bradley*, 22 Pick. R. 459; Story on Contracts, § 16, 17; Post, § 232.

the vendor to the horse should fail, the vendee would be obliged to keep and pay for the cow.¹

§ 205. Although, however, the general rule is, that, if the title of the vendor partially fail, the vendee is at law entitled to insist that the vendor shall specifically perform his contract as far as he is able, receiving a proportional diminution of the price ; yet it is only under circumstances of justice and equity, that this right can be insisted upon in a Court of Equity, and if there have been no fault on the part of the vendor, and the specific performance of his contract would be a great injury to him, while its non-performance would not injure the vendor, a Court of Equity would refuse to enforce a specific performance.²

§ 206. The subject of sale must, also, be one which is neither prohibited from sale by law, or by public policy and morals. For if it be positively injurious to the good interests of society, or tend to corrupt the morals, a sale of it will not be binding, so as to give the seller a legal claim for the price. Thus, a woman cannot sue for the price of her chastity. So, also, if goods, or furniture, or clothes, be furnished for the purposes of prostitution, or to be paid for out of the profits of prostitution, the seller cannot recover the price.³ But the mere fact that articles are sold to a prostitute will not deprive the seller of his claim for the price, unless the sale be of such a nature, or made under such circumstances, as directly to connect itself with, or to further her prostitution.⁴ So, also, the

¹ *Ibid.* ; *Johnson v. Johnson*, 3 Bos. & Pull. 170.

² 2 Story, Eq. Jurisp. § 779 ; *Paton v. Rogers*, 1 Ves. & Bea. 351 ; *Hill v. Buckley*, 17 Ves. R. 394 ; *Graham v. Oliver*, 3 Beav. R. 124 ; *Thomas v. Dering*, 1 Keen, R. 729 ; *Drewe v. Hanson*, 6 Ves. R. 678.

³ *Howard v. Hodges*, Midd. Sitt. B. R. before Kenyon, C. J., 2 Dec. 1796 ; 1 Selw. N. P. (8th ed.) 70 ; See Post, § 488.

⁴ *Bowry v. Bennett*, 1 Camp. R. 348 ; *Williamson v. Watts*, 1 Camp.

seller of indecent prints or of obscene books, cannot recover their price.¹

§ 207. Again, articles, which are expressly prohibited from sale by statute, cannot be sold so as to bind the purchaser.² Thus, where bricks were sold of different dimensions from those required by the statute, 17 Geo. III. ch. 42, under a penalty, it was held, that the vendor could not maintain an action for the price.³ So, also, where the selling of game was prohibited by statute, a contract for the sale of pheasants was held to pass no property.⁴ So, also, the same rule has been held to apply to sales of lottery tickets,⁵ or bank-notes,⁶ in places where the sale is prohibited; and to the sale of a title to lands previously adjudged to be illegal;⁷ and to the sale of shingles, not surveyed, or not of the dimensions required by statute.⁸ So, also, where a vendor sold drugs to a brewer, to be used in his brewery, in violation of the provisions of a certain statute, it was held that he could not recover.⁹

§ 208. This doctrine does not, however, apply to goods which are smuggled, unless they be otherwise and independently of the smuggling, either in violation of public policy

R. 553; *Lloyd v. Johnson*, 1 Bos. & Pull. 340; *Crisp v. Churchill*, cited in 1 Bos. & Pull. 340. See Post, § 485, *Illegal Sales*.

¹ *Fohres v. Johnes*, 4 Esp. R. 97; *Poplett v. Stockdale, Ry. & Mood*. 337. See Post, § 488.

² Story on Contracts, § 219, 220, 483, and cases cited.

³ *Law v. Hodson*, 11 East, R. 300; 2 Camp. R. 117.

⁴ *Helps v. Glenister*, 8 Barn. & Cress. 553.

⁵ *Hunt v. Knickerbacker*, 5 Johns, R. 327.

⁶ *Springfield Bank v. Merrick*, 14 Mass. R. 322.

⁷ *Mitchell v. Smith*, 1 Binn. R. 110.

⁸ *Wheeler v. Russell*, 17 Mass. R. 258; *S. P. Law v. Hodson*, 2 Camp. R. 147; *S. C.* 11 East, R. 300; *Forster v. Taylor*, 5 Barn. & Adolph. 889; *Springfield Bank v. Merrick*, 14 Mass. R. 322.

⁹ *Langton v. Hughes*, 1 Maule & Selw. 493.

and morals, or expressly prohibited by statute. If, therefore, smuggled goods be sold to a person knowing that fact, the sale will be good, unless it be in pursuance of an original agreement, entered into before the smuggling, and forming an inducement thereto.¹ But if the contract of sale be executory to purchase articles not imported, provided they shall be afterwards smuggled; or, if the fact of the smuggling be closely connected with the future sale, and form an inducement thereto, the sale is void. Indeed, the sale must be wholly disconnected from the smuggling, or it will be void.

§ 210. So, also, the sale of unwholesome or tainted provisions is void, as tending to the injury of the public health, if the sale be in the particular case conducive to such an end.² If, however, the provisions be sold for purposes not injurious to health the sale would be good. So, also, it has been held that where provisions are salted, branded, and inspected, and sold as merchandise, the seller is not to be understood as warranting them to be completely sound, provided they be not absolutely unwholesome.³

§ 211. A valid sale may also be made of living creatures, *feræ naturæ*, if the vendor be possessed of a qualified property, acquired *per industriam, propter impotentiam, or ratione soli*.⁴ In the first place, he may acquire a property in certain creatures *per industriam*, by reclaiming, or taming, or confining

¹ *Armstrong v. Toler*, 11 Wheat. R. 258, 271, 276; *The George*, *The Bothnia*, and *The Janstaff*, 1 Wheat. R. 408; *The George*, 2 Wheat. R. 278; *Tennant v. Elliot*, 1 Bos. & Pull. 3; *Farmer v. Russell*, 1 Bos. & Pull. 295; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Story on Contracts*, § 227; *Brown on Sales*, p. 131 to 117, § 182 to 196. See *Post*, § 507.

² *Pothier, Contrat de Vente*, No. 11.

³ *Winsor v. Lombard*, 18 Pick. R. 57. See *Post*, *Warranty*, § 348.

⁴ 2 *Black. Comm.* 391, 392; *Davies v. Powell*, *Willes*, R. 46; *Bracton*, L. 2, c. 1.

them, — as, if he confine deer in his park, or doves in his dove-cote, or fishes in his private pond, or pheasants in his mew, or rabbits or hares in his warren. But this property depends upon the possession and retention of the creature, and if at any time it absolutely escape and regain its natural liberty, the right of the owner is lost. A mere temporary escape or departure from his confines would not, however, divest him of his property if he should pursue them with the design of reclaiming them. But if he abandon all pursuit of them, the law presumes that he also intends to abandon all claim to them, and he loses his right to them.¹

§ 212. Where animals *feræ naturæ* are tamed, however, a temporary departure would not deprive the owner of his right, so long as their *animus revertendi* remained.² If, therefore, any person have tamed creatures, which are wont to come and go, and to leave his confines and return at their pleasure, their absence and departure does not destroy his property. Thus, a tame hawk, while he is pursuing his quarry in the owner's presence, and is free to go as he may please, is nevertheless the property of the original owner. Yet if tamed animals, which are accustomed to come and go, stray away and be absent for an unusual and very great length of time, without any knowledge on the part of the owner of their whereabouts, so that he abandons all reasonable hope of recovering them, they become common, and are the property of any person who retakes them.³

§ 213. In the second place, the vendor of creatures *feræ naturæ*, may have acquired a property therein *propter impo-*

¹ Inst. Lib. 2, tit. 1, 15; Bracton, L. 2, c. 1; Finch, L. b. 2, c. 17; Case of Swans, 7 Rep. 17; 2 Black. Comm. 391, 392.

² Ibid.; Bracton, L. 2, c. 1, p. 9; Case of Swans, 7 Rep. 17.

³ Ibid.; Ross on Vendors, 172, 173.

tentiam, — as, where hawks, or herons, or birds, or creatures of any kind, build nests or burrows in his land, and have young there; in which case he has a qualified property in the young so long as they are unable to fly or run away, but he loses it by their departure.¹

§ 214. Again, a qualified property in wild animals may be acquired *per privilegium*; that is, a person may have an exclusive privilege of hunting, taking, or killing them within certain limits, as by reason of a park or warren. But it is said, that in such cases, he has no property in the animals, but only in the privilege; and, therefore, the privilege alone can be made the subject of sale.²

§ 215. In the third place, a person may make a valid sale of creatures and things, in which he has a qualified property, *ratione soli*; as, in the wild fishes which swim in that part of a river, or brook, which runs through his ground; or, in the honey which is made by wild bees in his woods.³ It has been doubted, however, whether the bees themselves are wild, and belong to the owner *ratione soli*, or, whether they must be reclaimed and hived, and belong to him *propter industriam*, — it being agreed, that a qualified property in them may legally exist. Puffendorf thought that they were wild.⁴ Pliny thought that they were neither wild nor tame;⁵ and in the Roman law they were distinguished into wild and tame.⁶ The best opinion is, that wild bees, while they are on a person's land are his property *ratione soli*, and after he has reclaimed and hived them,

¹ Case of Swans, 7 Rep. 17; 2 Black. Comm. 394; Ross on Vendors, 178.

² Case of Swans, 7 Rep. 17; 3 II. 6, 55, b; Ross on Vendors, 178.

³ 2 Black. Comm. 393; Brook's Abridg. Tit. Propertie, 37.

⁴ Puffendorf, L. 4, c. 6, § 5.

⁵ Hist. Nat. l. 11, c. 5.

⁶ Dig. L. 47, t. 2, l. 26.

they belong to him *propter industriam*.¹ After they are reclaimed and hived, therefore, by any person, they become his property, which he only loses by his abandonment of claim, or neglect of pursuit, and not by their mere departure.²

¹ Inst. L. 2, tit. 1, § 14 ; Brac. Lib. 2, c. 1, § 3 ; Quinc. Orat. Decl. 13 ; Ross on Vendors, 178.

² Ibid.

CHAPTER VI.

THE PRICE.

§ 216. THE subject, which next presents itself to our consideration, is the price, — for when there are competent parties, mutually consenting to purchase and sell a commodity, which is properly a subject of sale, the next question to be determined between them, relates to the price. In this respect the first rule is, that no sale can take place without a price; *sine pretio nulla venditio est*. If there be no valuable consideration to support a voluntary surrender of goods by the real owner to another person, the transaction is called a gift, and is not governed by the rules relating to sale.

§ 217. There are three qualities requisite to constitute a legal price, such as is required in a contract of sale. 1st. It must be money, or its negotiable representative. 2d. It must be certain and definite, or capable of being rendered definite. 3d. It must be an actual price, seriously intended to be exacted.

§ 218. In the first place, the price must be in money, or in its negotiable representative, — bills of exchange, or promissory notes, or checks, — for if one article be exchanged for another, a barter is made, but not a sale. Both transactions are, however, governed by the same general rules of law. The contract does not, however, lose its character of a sale, if, after its execution, the seller agree with the purchaser to receive

something else than money in payment, as a substitute for the price originally agreed upon ; for it is not the actual payment of a price, but the agreement to pay a price, that is requisite to constitute a sale. *Non enim pretii numeratio, sed conventio perficit emptionem.*

§ 219. Where a bill of exchange, or a promissory note, is taken in payment, the rule of law is, that it does not operate as an absolute payment or extinguishment of the debt, unless by the express agreement of the parties ; but only as a conditional payment, operating to suspend the right of the party to sue for the debt until the maturity thereof, and to restrict his right, as to indorsers, to that of a simple holder of the note or bill.¹ The rule is, however, founded upon a mere presumption of the supposed intention of the parties, and may be rebutted by proof of a contrary intention, growing out of an express agreement, or arising, by implication, from the circumstances of the case.² Where there is no such agreement, the holder's right to sue on the original contract is in abeyance, during the currency of the note or bill ; but upon dishonor thereof, his right revives.³ The holder is, however, bound to perform all the duties growing out of his position as holder, or indorser, or he cannot recover.⁴ But in some of the American States, the doctrine obtains, that the taking a promissory note or bill of exchange, is *primâ facie* to be deemed an absolute

¹ Kendrick *v.* Lomax, 2 Crompt. & Jerv. 405 ; Soward *v.* Palmer, 2 Moore, R. 274 ; Packford *v.* Maxwell, 6 T. R. 52 ; Owenson *v.* Morse, 7 T. R. 64 ; Peter *v.* Beverly, 10 Peters, R. 567 ; Sheehy *v.* Mandeville, 6 Cranch, R. 253 ; Wallace *v.* Agry, 4 Mason, R. 342 ; Van Ostrand *v.* Reed, 1 Wend. R. 424 ; Story on Promissory Notes, § 104, 438.

² Ibid. ; Wallace *v.* Agry, 4 Mason, R. 336.

³ Packford *v.* Maxwell, 6 T. R. 52 ; Owenson *v.* Morse, 7 T. R. 64 ; Butler *v.* Haight, 8 Wend. R. 535.

⁴ Kendrick *v.* Lomax, 2 Crompt. & Jerv. 405 ; Soward *v.* Palmer, 2 Moore, R. 274 ; Smith *v.* Wilson, Andr. R. 187 ; Bridges *v.* Berry, 3 Taunt. R. 130.

payment, although this presumption may be rebutted;¹ the ordinary rule of the Common Law, that a promissory note or bill of exchange is *primâ facie* a conditional payment only, being entirely reversed.

§ 220. In the second place, the price must either be certain and definite, or must be susceptible of ascertainment by means of some mode of calculation, or some criterion prescribed in the contract, so as to render further negotiation in regard to it, unnecessary between the parties. Thus, the price may be left to the decision of a third person, and this will be sufficient; provided, that such person accept the duty, and actually perform it. If, however, he refuse to fix the price, or if he agree to fix it, but die before so doing, no sale will be made; unless, upon further agreement between the parties, the price be otherwise fixed. If the valuation of such third person be grossly and manifestly unjust and extravagant, it would seem, that the parties would not be bound thereby, at least in equity, since, as their agreement proceeded upon the supposition, that the estimate of such person would be fair and just, to require them to abide thereby would be to subject them to imposition and injury.² The estimate must, however, be grossly and manifestly incorrect and improper, in order to absolve the parties from the decision; for as the value of things is very

¹ It is so held in Massachusetts, in *Thatcher v. Dinsmore*, 5 Mass. R. 299; *Reed v. Upton*, 10 Pick. R. 525; *West Boylston Manuf. Co. v. Searle*, 15 Pick. R. 230; *Chapman v. Durant*, 10 Mass. R. 51, and note, Rand's ed.; *Chapman v. Searle*, 3 Pick. R. 45; and in Vermont, in *Hutchins v. Olcott*, 4 Verm. R. 549; *Curtis v. Ingham*, 2 Verm. R. 287; *Ferrey v. Baxter*, 13 Verm. R. 452; and in Maine, in *Varner v. Nobleborough*, 2 Greenl. R. 121; *Descadillas v. Harris*, 8 Greenl. R. 298; and in Louisiana, in *Hunt v. Boyd*, 2 Miller, Louis. R. 109.

² Vinn. in Inst. lib. 3, tit. 24, p. 612; Pothier, *Contrat de Vente*, No. 21; Stair, 131; Brown on Sales, p. 149, n. 202; Voet, ad Pand. lib. 18, tit. 1, § 23; Noodt, tom. 2, p. 390, 391; Huber. ad Inst. lib. 3, tit. 24, § 6; Bell, *Illust. Law of Scot.* § 92, p. 95, 96.

variable and dependent upon caprice, a valuation, in respect to which there is a mere difference of opinion, would not be sufficient to entitle either party to withdraw from his agreement. Again, the price may be fixed by reference to the price asked by a third person for a similar commodity; or, if the sale be executory, it will be sufficient to leave the price to be determined by the market value at a certain future day; or by the price at which a neighbor shall then sell. Thus, in the province of Orleans, it is customary for one vintner to make a sale of the wine of the coming harvest, at the price which his neighbors may demand for theirs; nor in such case does it make any difference, that the neighbors sell at different prices, since the average price would then be considered as intended. So, also, a sale may be made of an article for what it is worth; if, in such a case, the worth can be settled satisfactorily to both parties by reference to experts.¹

§ 221. Where nothing is said by either party concerning the price, the law implies, in case the contract is executed, and the goods sold are accepted, that the purchaser agrees to give its

¹ These are the rules of the Roman and Scottish Law in regard to which there have been no English decisions, but which approve themselves to common sense, and, therefore, are not unworthy of the countenance of the Common Law. In addition thereto, by the Roman and Scottish Laws the rule obtains, that the price cannot be lawfully left to one of the parties to be fixed, and that no valid sale can occur, when the price is agreed to be whatever sum the seller shall be offered by any third party. The ground, upon which the latter rule is adopted, is stated by Pothier to be, "that any different one would give rise to many frauds. The buyer, in order to obtain the thing for a small sum, might bring forward a person to offer a mean price, and the seller, with a view to obtain a large sum, might interpose an offer of a high price in the same manner. Besides, if the seller should be unwilling to abide by the contract, he might conceal from the buyer the offers which had been made to him." Pothier, *Contrat de Vente*, No. 27; Brown on Sales, p. 150, n. 204, 205; Vinn. ad Inst. 3, 24, p. 612, § 3; Voet, ad Pand. 18, 1, § 23; Ersk. 3, 4; Stair, 131; Bell, *Illust. Law of Scot.* § 92, p. 95, 96.

reasonable worth, which is presumed to be its market value at the time.¹ But it seems questionable, whether the same presumption would always be created by the mere silence of the parties as to the price, where the contract is only executory, and the goods are still in the possession and under the control of the seller, unless there be other circumstances tending to create the same presumption.² Where the contract is to supply goods at a reasonable price, such a price is implied, as a jury, upon the trial of the cause, shall, under all the circumstances, decide to be reasonable, and not in all cases the current price of the commodity at the time when, and place where, the goods are delivered; for such price may, by accidental circumstances, be rendered highly unreasonable within the meaning of the purchaser. Thus, if a cargo of merchandise be ordered, some time must elapse before the order can reach the other party, and before he can procure the goods; and if, in the intermediate time, the market price be unreasonably enhanced from accidental circumstances, as from a blockade, or tempest, or speculative mania, or from any other cause, the market price would furnish no test to the reasonableness of the price.³

§ 222. Where there is an agreement for sale at a specific price, the seller cannot recover from the purchase on a count

¹ *Hoadley v. M'Laine*, 10 Bing. R. 487. In this case, Ch. Justice Tindal, in delivering the opinion, said: "It is clear, that a contract for the sale of a commodity, on which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth. What is implied by law is as strong to bind the parties, as if it were under their hand. This is a contract, in which the parties are silent as to price, and therefore, leave it to the law to ascertain what the commodity contracted for is reasonably worth." *Acebal v. Levy*, 10 Bing. R. 382.

² *Acebal v. Levy*, 10 Bing. R. 382; *Webber v. Tivill*, 2 Saund. R. 121, note 2, by Serg't Williams.

³ *Acebal v. Levy*, 10 Bing. R. 382.

for a *quantum valuit*, but he must declare for the actual price.¹ So, also, although, as we shall see, if no price be stated in the statute of frauds, the current price will be presumed to have been intended ; yet if it be shown by parol evidence, that a specific price was really fixed, the seller cannot, on producing a memorandum in writing of the sale, which is altogether silent as to price, recover on a *quantum valuit*.²

§ 223. In the third place, the price must be an actual one, which the vendor intends seriously to exact, and the vendee seriously intends to pay. If, therefore, by the terms of the contract, the buyer is to be absolved from payment, there will be no perfect sale, but merely a gift, however formal the instrument may be, by which the sale is effected. Thus, if a husband should execute any formal instrument of sale of any chattel personal to his wife, for the purpose of making it irrevocable, and putting it out of the reach of his creditors, but with the understanding, that she was not to pay for it, no sale would take place. So, also, if a party should, under pretence of making a sale, in reality make a loan, it would merely be considered as a loan, although it were made with all the formalities of a sale. Thus, if a party should make the contract of *mohatra*, by selling on credit for a certain sum, and then repurchasing for a smaller sum and paying in ready money, the transaction would be treated merely as a loan, and if it were made for the purpose of avoiding any legal objection as a loan, it would be void.³ So, also, if a debtor make a bill of sale of goods to a creditor, greatly more than sufficient to indemnify him for his claim, and for the purpose of putting the goods out of the reach of other creditors, the bill of sale would pass no more goods than would be a fair equivalent for the debt.⁴

¹ *Elmore v. Kingscote*, 5 Barn. & Cres. 583 ; *Cooper v. Smith*, 15 East, R. 103 ; *Acebal v. Levy*, 10 Bing. R. 382.

² *Ibid.* ; *Elmer v. Kingscote*, 5 Barn. & Cres. 583.

³ *Post*, § 517 ; *Pothier de Vente*, No. 38.

⁴ *Post*, § 517.

§ 224. Mere inadequacy of price affords no ground to set aside a sale, unless it be of so gross a nature, and given under such circumstances, as to afford a necessary presumption of fraud or imposition,—as where it indicates undue advantage taken, or influence exerted on an imbecile or weak-minded person; or, unless it manifestly indicates mistake, and then a Court of Equity will grant relief.¹ The general rule is, that any *bonâ fide* consideration, however slight, which works any benefit to the one party, or any injury to the other, is sufficient to support a contract, in which there are no elements of fraud. It is not necessary, that the price should be a precise equivalent in value for the article purchased; but only that it should not be unreasonably small or merely nominal.² For a person is not to be precluded from his privilege of selling or purchasing at a price below the actual value of the goods sold, if no fraud or deception of any kind be practised. Indeed, however small the price may be, if it be an actual price, and not merely a nominal one, it will be sufficient as between the parties; although, if the transaction be of such a nature, and be made under such circumstances, as to indicate a purpose of defrauding creditors, or of giving color to an improper transaction,³ the person or persons injured thereby might have relief as against the parties, and claim to have the contract set aside.

§ 225. In order to entitle the vendee to take the goods which

¹ Story, Eq. Jurisp. § 244, 245; *Nott v. Hill*, 1 Vern. R. 167; 2 Vern. R. 26; *Griffith v. Spratley*, 1 Cox's R. 383; *Butler v. Haskell*, 4 Dess. S. C. Eq. R. 651; *Copis v. Middleton*, 2 Madd. Ch. R. 410; *Osgood v. Franklin*, 2 Johns. Ch. R. 23, 24; *Robinson v. Schly*, 6 Geo. R. 515; *Taylor v. Eckford*, 11 Smede & Marsh. 21; *Waller v. Cralle*, 8; *B. Monroe*, R. 11.

² The rule of the Scottish and Civil Law of France is similar. *Brown on Sales*, p. 117, 118, § 199, 200; *Pothier, Contrat de Vente*, No. 20. By the Roman Law, a sale for one half the value of the property might be set aside for inadequacy. 1 *Domat, Civ. Law*, B. 1, tit. 2, § 3, 9, art. 1; *Heinecc. Elem. B.* 1, ch. 13, § 352; *Ibid.* § 359; *Cod. Lib.* 4. tit. 44, l. 2, 9.

³ *Comyn's Dig.* Action on the case, *Assumpsit* B. 1; *Forth, v. Stanton*, 1 Saund. R. 211, n. 1, 2; *Miller v. Drake*, 1 Caines, Cas. 45.

he has bargained for, he is bound, (unless there be a special contract to the contrary, as if the goods be sold upon credit,) to tender the *whole* price to the vendor, in order to entitle himself to any portion of the goods, and he cannot, by tendering a part of the price, claim to take a corresponding portion of the goods. But if credit be given expressly or impliedly, as, if a bill of exchange or promissory note be taken in payment by the vendor,—he is bound to deliver up the goods immediately upon application by the vendee.¹

§ 226. Where the property has once passed to the vendee, the failure of the purchaser to pay the price, according to the terms of the agreement, does not entitle the vendor to rescind the bargain; but only to bring the special action for damages. Although, therefore, the goods should remain in the custody of the vendor, his right, in such a case, would be merely a right of lien, as far as the specific goods were concerned. Thus, where the following contract was made: “April 23, 1838, sold to Mr. John Martindale, of Cottenham, six oat-stacks for £85. John Smith gives John Martindale liberty to let the stacks stand, *if he thinks fit*, until the middle of August next; and John Martindale is to pay to John Smith for the stacks, in twelve weeks from the date thereof,” and this agreement was signed by the parties; and the plaintiff did not pay at the appointed time, but afterwards tendered payment to the defendant, which the latter refused, and sold the goods; and the plaintiff brought trover against him, he was held to be entitled to recover. The Court, in this case, cited with approbation the rule of the Civil Law, as stated by Pothier, that a purchaser’s delay in paying the price does not give the vendor a right to require a dissolu-

¹ As to the obligations of the vendee in paying the price, see Post, § 403; Brown on Sales, § 307, p. 210; Hoadley v. M'Laine, 10 Bing. R. 512; Conway v. Busk, 4 Barb. Sup. Ct. R. 565; McDonald v. Hewett, 15 Johns. R. 399.

tion of the contract; and went on to say, that the vendor's right to detain the thing sold against the purchaser, was a mere right of lien until the price is paid, and not a right to rescind the bargain.¹

¹ *Martindale v. Smith*, 1 Adolph. & Ell. N. S. 397; S. C. 1 Gale & Dav. 1.

CHAPTER VII.

OF THE DIFFERENT SPECIES OF CONTRACTS OF SALE.

§ 227. INASMUCH as the rights, duties, and liabilities of the parties to a contract of sale are greatly modified by the mode in which it is made, and the form that it assumes, it becomes necessary, before proceeding farther, to consider the distinctions which exist between the different kinds of contracts of sale.

§ 228. Contracts of sale may be divided into Express and Implied Contracts; Executory and Executed Contracts; Entire and Severable Contracts; and Absolute and Conditional Contracts.

§ 229. With regard to the first class, or that of Express and Implied Contracts, little need be said in this connection. If the contract be express, the parties are both bound by its precise stipulations, unless by mutual consent the terms are altered. Such a consent may not only be expressly given, but it may be implied, when the circumstances are such as to be consistent with no other explanation.¹ A contract may also be implied from the acts of both parties; or from the acts of one and the silence of the other, whenever the conduct of both manifests

¹ 2 Black. Comm. 443; *Ogden v. Saunders*, 12 Wheat. R. 341; *Story on Contracts*, § 11.

clearly an agreement to purchase and sell.¹ Thus, if a person go into a shop, and order particular goods, which he selects to be sent home, he will be understood to agree to pay for them their market value, at the time when he selected them. He will not, however, be bound to pay an excessive price therefor; and, if it be insisted on by the vendor, he would be at liberty to send back the goods or article taken, if it be within his power; or, if it be not within his power, to refuse to pay more than their market value for them.² For if the vendor attach any particular value to articles thus ordered, it is his duty to inform the vendor thereof, and his silence would be indicative of his assent to sell them at the common market valuation.³ No contract, however, will ever be implied, in contravention of an express contract; nor indeed in any case, unless such a hypothesis would alone explain the circumstances. If, therefore, the conduct of both parties be susceptible of a different or better explanation, a contract of sale would not be implied.⁴ Indeed, an implied contract only differs from an express contract, in the mode of proof; both equally proceed upon the mutual agreement of the parties, and cannot exist without it. If the agreement be formally and verbally stated, the contract is express; if it be inferred from the acts of the parties, or the circumstances of the case, it is implied.

§ 230. Again; if nothing be said in relation to the terms of the sale, it will be presumed to be made in compliance with the general usage or custom of the trade, or to the uniform practice

¹ Ibid.; *Abbott v. Hermon*, 7 Greenl. R. 118; *Brackett v. Norton*, 4 Conn. R. 524; *Richards v. Sears*, 6 Adolph. & Ell. 474.

² 2 Black. Comm. 443; *Stark v. Cheeseman, Ltd.* Raym. R. 538; 1 Pothier on Oblig. 69, and note (b,) Evans's ed.

³ *Hoadley v. McLaine*, 10 Bing. R. 482; *Acebal v. Levy*, 10 Bing. R. 382; *Bell on Sales*, p. 19.

⁴ 2 Black. Comm. 443; 3 Black. Comm. 159 to 166; *Touissant v. Martinant*, 2 T. R. 104; *Cutler v. Powell*, 6 T. R. 320; *Yates v. Pim*, 2 Marsh. R. 141; *Cowley v. Dunlop*, 7 T. R. 568.

and course of dealing between the parties.¹ The usage must, however, be so general, as to afford a very strong presumption that the contract was made in view of it; or the practice and course of dealing between the parties must have been so uniform, as to furnish strong evidence that they recognized and assented to it.² Thus, if a sale be made in a particular branch of trade, in which the universal custom is to allow a certain term of credit, and in the particular sale no special terms differing therefrom are fixed, the parties will be considered as making the custom a portion of their contract.³

§ 231. The next distinction is between Executed and Executory Contracts of sale. An executed contract of sale is one in which the whole matter of the sale is concluded at once by an immediate transfer of the subject by the one party and of the price by the other. In such a case neither party has any remedy unless there have been either fraud, mistake, or a failure of warranty.⁴ An executed sale is also understood to mean a sale where nothing remains to be done by either party, although it was originally executory.

§ 232. An executory contract of sale is a contract in which something is to be done by one or both parties.⁵ A purely executory contract is executory on both sides, and claims the first attention. It is rather an agreement to sell than a sale; since by the Common Law a sale can only be made of a thing *in presenti*. Thus, a contract by a merchant in London to

¹ *Wood v. Wood*, 1 Car. & Payne, 59; *Moore v. Voughton*, 1 Stark. R. 487; *Scott v. Irving*, 1 Barn. & Adolph. 605; *Stewart v. Aberdeen*, 4 Mees. & Welsb. 211.

² *Ibid.*

³ *Swancot v. Westgarth*, 4 East, R. 74; *Gordon v. Swan*, 2 Camp. R. 429, *u.*

⁴ *Fletcher v. Peck*, 6 Cranch, R. 136.

⁵ *Plowden*, R. 9; 2 Black. Comm. 447.

sell all the goods of a particular description, which his foreign agent may ship in a certain vessel, or within a certain time, is an executory contract of sale.¹ So, also, in this class of contracts are included all contracts to sell goods not made or manufactured, but which the vendor agrees to make or manufacture, and furnish for a certain price, which the vendee agrees to give;—such as sales of a chariot to be built by the seller; or of corn to be threshed; or of a ship to be built.²

§ 233. Where the contract is executory for the sale of articles not in existence, but to be made or manufactured, no property passes to the orderer, until the thing is completely finished, and is either delivered to him, or is appropriated to his benefit, set apart for him, and is accepted by him. Nor does it make any difference, that the price is advanced, or that the contract contains a specification of the dimensions and other particulars of the thing to be made, and fixes the precise mode and time of payment by months and days; since the agreement is considered as a bargain for an entire thing, and not for unfinished parts of it.³ So, also, in such a case, the maker would not, ordinarily, be bound to deliver to the purchaser the particular thing upon which he is engaged, and intends for such purchaser, or which the purchaser supposes to

¹ *Boyd v. Skiffkin*, 2 Camp. R. 326; *Hayward v. Scougall*, 2 Camp. R. 56.

² *Towers v. Osborne*, 1 Str. R. 506; *Clayton v. Andrews*, 4 Burr. R. 2101; *Dunmore v. Taylor*, Peake, R. 41; *Mucklow v. Mangles*, 1 Taunt. R. 318.

³ *Laidler v. Burlinson*, 2 Mees. & Welsb. 614 to 617; *Goode v. Langley*, 7 Barn. & Cress. 26; *Clarke v. Spence*, 4 Adolph. & Ell. 448; S. C. 6 Nev. & Man. 399; *Simmons v. Swift*, 5 Barn. & Cress. 857; *Mucklow v. Mangles*, 1 Taunt. R. 318; *Wilkinson on the Law of Shipping*, ch. 2; *Carruthers v. Payne*, 5 Bing. R. 270; *Rohde v. Thwaites*, 6 Barn. & Cress. 385; *Atkinson v. Bell*, 8 Barn. & Cress. 277; *Gregory v. Stryker*, 2 Denio, R. 628.

be intended for him ; but he may, if he please, dispose of it to some other person, and furnish another article corresponding to the specification in the contract.¹ But where the contract provides that the article shall be built under the superintendence of a person appointed by the orderer, the manufacturer could not compel the orderer to accept a thing not constructed under the direction, and approved of by the superintendent ; and, therefore, he could not sell to any other person than the orderer, an article, the building of which had been so superintended ; since, if he could, he would thereby be enabled to burden the orderer with the expense of employing a person again to superintend the building of another vessel. The fact, therefore, that a superintendent is appointed, is considered as an appropriation of the materials approved by him, and used in the construction of the thing, and an appropriation of the thing, as far as it is constructed.²

§ 234. Again ; where, by the terms of the contract, there is a provision that stipulated instalments of the price shall be made, regulated by particular stages in the progress of the work, the general property of so much of the thing as is finished at the payment of each instalment, is thereby vested in the orderer ; subject only to the right of the builder to retain it in order to complete it and earn the remainder of the price.³ The rights of the parties after the payment of any one of the instalments will, therefore, be the same as if so much of the thing as is then constructed had originally belonged to the purchaser,

¹ *Clarke v. Spence*, 4 Adolph. & Ell. 448 ; S. C. 6 Nev. & Man. 399.

² *Woods v. Russell*, 5 Barn. & Ald. 942 ; S. C. 1 Dowl. & Ryl. 587 ; *Laidler v. Burlinson*, 2 Mees. & Welsb. 614 to 617 ; *Clarke v. Spence*, 4 Adolph. & Ell. 448 ; *Wilkinson on Law of Shipping*, ch. 2.

³ *Clarke v. Spence*, 4 Adolph. & Ell. 448 ; *Woods v. Russell*, 5 Barn. & Ald. 942 ; *Laidler v. Burlinson*, 2 Mees. & Welsb. 614, 617. See, also, *Atkinson v. Bell*, 8 Barn. & Cress. 282 ; *Carruthers v. Payne*, 5 Bing. R. 277 ; *Oldfield & Lowe*, 9 Barn. & Cress. 73, 78.

and had been delivered by him to the builder to be added to and finished.¹ In such a case, the mere payment of the instalment by the purchaser, and the reception of it by the seller, is a delivery and acceptance sufficient to pass the title to the property. If, therefore, the thing be destroyed after the payment of the first instalment, the orderer cannot recover the money advanced, nor can the manufacturer recover for the value added by his work, between the intermediate times of payment. It seems, also, that although, where a superintendent is appointed, the property is specially appropriated to the orderer, yet it is not so vested in him as to throw upon him the responsibility in case of loss.²

§ 235. When, in such an executory contract, the orderer of goods to be manufactured supplies the materials for the work, the work, as far as it is done, becomes the property of the purchaser; and in case of its destruction by fire, or by other accident, he must bear the loss not only of the materials, but also of the value of the labor done.³ So, also, in such case, as the work belongs to the orderer, trespass would lie against a creditor of the manufacturer for levying upon it.⁴

§ 236. A contract may also be executory only on one side, and executed on the other; as, where a sale is made on credit, or money is paid for an article *in esse*, which is not immediately to be delivered. Where an article is sold and delivered,

¹ Ibid.

² *Clarke v. Spence*, 4 Adolph. & Ell. 448; S. C. 6 Nev. & Man. 399; *Atkinson v. Bell*, 8 Barn. & Cress. 282; *Laidler v. Burlinson*, 2 Mees. & Wels. 602, 614 to 617.

³ Story on Bailments, § 438; 1 Bell, Comm. 458; Pothier, *Contrat de Louage*, No. 434; *Menelone v. Athawes*, 3 Burr. R. 1592; *Gillet v. Mawman*, 1 Taunt. R. 137; *King v. Humphreys*, 10 Barr. R. 217; *Gregory v. Stryker*, 2 Denio, R. 628.

⁴ *King v. Humphreys*, 10 Barr. R. 217.

and is to be paid for by the vendee at a subsequent time, the property is completely vested in the vendee, so that the vendor cannot reclaim the goods, but is put to his action for the price.¹ The delivery, however, in such case, should be complete and final, or the vendor would still retain a right of stoppage *in transitu*, as we shall hereafter see.² So, also, if a certain term of credit be given to the vendee, the vendor cannot, before the expiration of such term, maintain an action for the value of his goods.³ So, also, if the purchaser agree to pay for the goods at a certain future date, by his acceptance or note payable at a still more remote date, and he refuse to give his note or acceptance at the time agreed upon, or according to the terms of the contract, the vendor cannot maintain a general action of money had and received against him, until the acceptance or note would be payable; since that would be to sue him for the price before the lapse of the whole period, for which credit was given. He must, therefore, either bring a special action on the case, whereby he may recover damages for the injuries he has actually sustained by the breach of contract; or, he must wait until the entire period of credit is passed, — and then he may bring his general action of *indebitatus assumpsit*.⁴ Thus, where goods were sold to be paid for in two months, by a bill payable in two months from then, it was held that the credit was for four months,* and that *indebitatus assumpsit* would not lie until four months had passed; and that the vendor could

¹ Mucklow v. Mangles, 1 Taunt. R. 318; Ex parte Flinn, 1 Atk. R. 185; Noy's Max. c. 42; Ross on Vendors, 52; Swanscot v. Westgarth, 4 East, R. 74; Gordon v. Swan, 2 Camp. R. 429, n.

² See Post, § 327.

³ Millar v. Shawe, cited in Mussen v. Price, 4 East, R. 147; Dutton v. Solomonson, 3 Bos. & Pull. 582; Lee v. Risdon, 7 Taunt. R. 188; Hoskins v. Duperoy, 9 East, R. 498; De Symons v. Minchwich, 1 Esp. R. 430; Brooke v. White, 1 New R. 330; Swears v. Wells, 1 Esp. R. 317.

⁴ Ibid.; Mussen v. Price, 4 East, R. 147; Brooke v. White, 1 New R. 330; Eddy v. Stafford, 18 Vermont, (3 Washburn) R. 235.

not abandon the contract and sue the vendee for the price, upon the refusal of the latter, after the expiration of two months, to give his bill for two months.¹ Indeed, the general rule in all executory contracts is, that the party must declare specially, so long as it remains executory ; but when it is executed he may declare generally.² Yet if, in the last mentioned species of sale, the credit be absolute only for a certain time, and contingent for a subsequent future time, the vendor might bring his action for the price, as soon as the absolute time of credit has elapsed. Thus, where the agreement was, that three months' credit should be allowed, at the expiration of which time, if further time were needed or required by the vendee, a bill at three months was to be taken, — it was held, that *indebitatus assumpsit* would lie at the expiration of three months, as the agreement was not for a credit of six months certain.³

§ 237. If, however, credit be given voluntarily after the contract has been made, and form no part of the consideration of the original agreement, it may be revoked at any time, because it is founded upon no valuable consideration.⁴ But if a vendor being entitled to immediate payment, take a bill payable at a subsequent time, he cannot pursue his general remedy against the vendee until the bill becomes due, because a negotiable instrument implies a sufficient consideration, and is an exception to the general rule.⁵

§ 238. So, also, if the purchaser advance the purchase-

¹ Millar v. Shawe, cited 4 East, R. 147.

² Alcorn v. Westbrook, 1 Wils. R. 115 ; Weston v. Downes, Doug. R. 23 ; Power v. Welles, Cowp. R. 818 ; Dr. Compton's case, cited, 1 T. R. 136.

³ Nickson v. Jepson, 3 Stark. R. 227.

⁴ De Symons v. Minchwich, 1 Esp. R. 430.

⁵ Stedman v. Gooch, 1 Esp. R. 5.

money, the property in the goods immediately passes to him, so that he may recover them by an action in trover from either the vendor, or from any person who may obtain possession thereof; or, he may bring a special action against the vendor for non-performance of his contract.¹ But until the seller has done all that by the contract or custom of trade it is his duty to do, in respect of the subject-matter of the sale, the safety of it is at his risk, and he must bear any loss which may happen.²

§ 239. Executory contracts for the future delivery of goods, existing at the time of the sale, are within the provisions of the statute of frauds. But executory contracts for the delivery of goods, after they shall be manufactured, or after certain work and labor shall be expended upon them, are not within the statute; ³ the first class being considered as sales, and the latter as merely agreements to sell.

§ 239 *a*. Where there is a breach of an executory contract, the party injured thereby is entitled to indemnity for the loss which the mere performance of his obligation by the other

¹ Ross on Vendors, 52.

² See Post, § 296.

³ *Rondeau v. Wyatt*, 2 H. Blackstone, '63. The distinction in the text will explain the old cases, which are apparently so contradictory, and is recognized in all the late authorities. The first case on this subject, *Tower v. Osborne*, Str. R. 506, was a contract for the manufacture of a chariot, which was held not to be within the statute. So, also, in *Clayton v. Andrews*, 4 Burr. R. 2101, the contract was for the delivery of wheat, after it should be thrashed, which, being a contract for labor and services, was held not to be within the statute. See Lord Kenyon's remarks in *Cooper v. Elston*, 7 T. R. 14; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surman*, 9 Barn. & Cress. 561; *Bennett v. Hull*, 10 Johns. R. 364; *Crookshank v. Burrell*, 18 Johns. R. 58; *Watts v. Friend*, 10 Barn. & Cress. 446; *Sewall v. Fitch*, 8 Cow. R. 215; *Jackson v. Covert*, 5 Wend. R. 139; 2 Kent, Comm. Lect. 39, p. 511, note (b).

party has occasioned him, as well as for the gain of which it has deprived him. But the gain contemplated by this rule is only that which is the direct and immediate fruit of the contract, and does not include merely speculative gains and profits. Thus, where a manufacturer fails to deliver to the orderer certain machinery within a time specified in his contract, the orderer cannot claim to recover, as damages, the estimated profits which might have been made by the manufacture of a quantity of flax seed into linseed oil, by such machinery, had the contract been properly performed.¹

§ 210. We now come to the third class of contracts of sale, namely, Entire and Severable Contracts. An entire contract is a contract, the consideration of which is entire on both sides. It contemplates no apportionment upon any partial failure of consideration on either side, and affords, by its terms, no exact means of such apportionment. The complete fulfilment, therefore, of his part of the contract by one party, is a condition precedent to the fulfilment of any part of his contract by the other.² Thus, whenever a sale is made of one certain thing for one certain price; as, if a cow be sold for \$20, the contract is entire, and the purchaser is liable for the whole price, if he keep the cow; unless there be a breach of warranty; or, unless he be permitted, under the circumstances, to

¹ *Freeman v. Clute*, 3 Barb. Sup. Ct. R. 424.

² *Cutler v. Powell*, 6 T. R. 326; *Stark v. Parker*, 2 Pick. R. 267; *Paradine v. Jane*, Aleyn, R. 26, 27; 3 Viner, Abr. Apportionment; *Appleby v. Dods*, 8 East, R. 300; *Grinman v. Legge*, 8 Barn. & Cress. 326; *Jennings v. Camp*, 1 Johns. R. 94; *Reab v. Moor*, 19 Johns. R. 337; *Faxon v. Mansfield*, 2 Mass. R. 147; *Ex parte Smyth*, 1 Swanst. R. 338, the Reporter's note and cases cited; *Chandler v. Thurston*, 10 Pick. R. 209; *Huttman v. L'oulois*, 2 Car. & Payne, 510; *Byrd v. Boyd*, 4 McCord, R. 246; *Gilpins v. Consequa*, 1 Peters, C. C. R. 91; *Youqua v. Nixon*, 1 Peters, C. C. R. 221; 1 Story, Eq. Jurisp. § 470 to 479; *McKnight v. Dunlop*, 1 Barb. Sup. Ct. R. 36; *McMillan v. Van Derlip*, 12 Johns. R. 165.

retain them as the agent of the vendor.¹ The same rule governs, also, in cases where several articles, or a mass or quantity of goods are sold for one gross sum, — as, if the agreement be to sell a quantity of corn for one whole sum; or, all the meal that a man has in his store for fifty dollars; or, if a cow and four hundred pounds of hay be sold together for seventeen dollars;² or, if two horses be sold together for one entire price.³ In such cases, if, before the seller has done all that it is incumbent on him to do, the cow should die, or a portion of the corn or meal should be lost or destroyed; the seller could not insist that the buyer should take the remainder of the grain, or the four hundred pounds of hay, at a ratable reduction of price.⁴ And the reason of this rule is, that in these contracts, no means are afforded by their terms, by which the value, at which any portion was estimated by either party can be ascertained; and, also, that their terms do not indicate that either party ever contemplated taking any portion without taking the whole. The entirety, therefore, may be, and in fact legally is, the only express consideration. Thus, suppose a yoke of oxen be sold for sixty dollars, and one of them die before delivery, how would it be possible to determine the valuation, which the purchaser made thereof, or how much he would have been willing to give for the living ox alone, or whether he would ever have bought the one without the other. The two essential considerations in all these cases are, whether the consideration is capa-

¹ Ibid.

² *Miner v. Bradley*, 22 Pick. R. 459; *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Mayfield v. Wadsley*, 3 Barn. & Cress. 361; S. C. 5 Dowl. & Ryl. 288; *Wood v. Benson*, 2 Crompt. & Jerv. 94; *Kingdom v. Cox*, 12 Jur. 336; *Paige v. Ott*, 5 Denio, R. 406; *Davis v. Maxwell*, 12 Metcalf, R. 286; *Irving v. Thomas*, 6 Shepley, R. 418. See Story on Contracts, § 21 to 26, for a full consideration of the law relating to Entire and Severable Contracts.

³ *Symonds v. Carr*, 1 Camp. R. 363.

⁴ Ibid.; *Miner v. Bradley*, 22 Pick. R. 459.

ble of apportionment by the terms of the contract, and whether the exact quality is of the essence of the contract.

§ 241. It should be here observed, however, that the "contract for the sale of goods" required by the statute of frauds, is not an entire contract within this definition, nor, indeed, an entire contract at all, in the strict sense of the term; although it is sometimes spoken of as such in the cases, for the purpose of distinguishing sales of different things, when made at one time, from similar sales, when made at wholly distinct times. The statute of frauds, in speaking of "a contract for the sale of goods," is considered to apply to the sales of any number of distinct articles, although the price of each article be less than ten pounds, provided they all be purchased at one time; and such a transaction would be considered as an entire sale within the terms of the statute; but it would by no means be an entire contract of sale within the ordinary acceptance of that term. Thus, where the plaintiff went into a linen draper's shop and purchased a number of different articles, a separate price being agreed upon for each, and a bill of parcels was sent to his house; it was held that the contract was entire, and, as the whole amount of the sale was seventy pounds, that the sale was within the statute of frauds, although the price of each article was under ten pounds.¹ So, also, where a certain num-

¹ *Baldey v. Parker*, 2 Barn. & Cres. 41. The whole argument, in the opinion delivered in this case, turns upon the ground, that to construe the statute not to be applicable to a sale of different articles made at one time, although for distinct prices, would be to defeat its object, and, therefore, that the statute must have been intended to apply to such a case. The term "entire contract," in this case, is not used in its ordinary sense. This is evident from the remarks of Mr. Justice Bayley. He said: "The buyer cannot be considered to have actually received the goods, when they have remained from first to last in the possession of the seller. The plaintiffs are not assisted by the exception in the seventeenth section of the statute of frauds. Then the question is, whether there was a separate contract for each

ber of lamps, of entirely different kinds and prices, and to be used for different purposes, were contracted for, part of them being already manufactured, and part to be manufactured according to order, — it was held that the contract was entire, and that an acceptance of a part was an acceptance of the whole, under the statute of frauds.¹ Mr. Baron Alderson in this case said, “The transaction constituted but one contract. There is no distinction between this case and that of a party who goes into a shop and buys fifty different articles at the same time. It is clear that such a person does not make fifty different contracts. If a man enters into an entire agreement for goods made, and for others to be made, his accepting part of the goods made is evidence of his having entered into the agreement. That is the true object and meaning of the statute. The articles bargained to be made are treated for this purpose as goods

article. The 29 Car. 2, c. 3, was passed to guard against frauds and perjuries; and it must be collected from the seventeenth section, that the legislature thought that a contract to the extent of 10*l.* might be sufficient to induce the parties to it to bring tainted evidence into Court. Now it is conceded here, that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l.* Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the seventeenth section of the statute; and I think that the circumstances of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law. It has been asked, what interval of time must elapse between the purchase of different articles in order to make the contract separate; and the case has been put of a purchaser leaving a shop after making one purchase and returning after an interval of five or ten minutes and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute.” The opinion of Mr. Justice Holroyd, also, still more plainly indicates the meaning of the case. See *Story on Contracts*, § 781, (3d ed.)

¹ *Scott v. The Eastern Counties Railway Co.* 12 Mees. & Welsb. 33. See, also, to the same point, *Sleddon v. Cruikshank*, 16 Mees. & Welsb. 71; *Atkinson v. Smith*, 14 Mees. & Welsb. 695.

actually made, although they are not in existence at the time of the agreement." Lord Abinger also said, "I think the order for the ready-made lamps, and that given for the triangular one, amounted but to one contract. Can it be said, that, if a man goes to a tailor's shop and buys a suit of clothes which are ready-made, and at the same time orders another suit to be made for him, and the former are sent home to and accepted by him, he is not bound to pay for the latter."¹

§ 242. A severable contract is a contract, the consideration of which is, by its terms, susceptible of division and apportionment, so as to conform to the unascertained consideration on the other side. Thus, an agreement to pay a man the worth of his services, so long as he will work; or, to take as many articles of a particular kind, as can be made or procured in a day, at a certain price per single article; or to buy as much grain as corresponds to a sample, at a certain price per bushel, are examples of severable contracts. In these cases, the actual number and amount of articles purchased is indefinite, and is not of the essence of the contract, and no gross sum is fixed as a price. The contract, therefore, contemplates no entire quantity, and no entire price, but merely a certain relation and proportion between the work done, or the number, or amount supplied, and the price paid, which is to be ascertained after the completion of the contract on one side. The criterion of a severable contract is, that the consideration on one side is indeterminate until the contract is completed on the other side, and then it is determined by some rule, fixed by the terms of the agreement.²

¹ See, also, *Seymour v. Davis*, 2 Sandf. Sup. Ct. R. 239. But see *Roots v. Dormer*, 4 Barn. & Adolph. 77; *Emmerson v. Heelis*, 2 Taunt. R. 46, in which a contrary doctrine is held. The diversity of the cases upon the question of entirety and severalty of a contract render it peculiarly embarrassing to lay down any rule. The distinction in the text is the only mode that we see of reconciling, in any measure, the cases.

² Story on Contracts, § 21; 5 Vin. Abr. Apportionment; *Clark v. Baker*, 5 Metc. 452; 2 Stark. Evid. 1667.

§ 243. There is another class of mixed cases, partaking of the character both of entire contracts, and of severable contracts, in which, although a certain definite number or quantity of things are bought together, the price is fixed either by a certain agreed rate, to be paid per single article or measure; or by affixing a particular valuation to each thing, if the things be of different kinds.¹ Thus, where a certain farm, and dead stock, and growing wheat, were all sold together, but a separate price was affixed to each, it was held, that the contract was only entire as to each item, but as a whole, it was severable into three contracts, and that a failure to comply with the contract in one particular, did not invalidate the sale, or give the vendee a right to reject the whole contract.² Again, where A. purchased two estates, the one for £700, and the other for £500, and took one conveyance of both, and he was afterwards evicted from the one by reason of a defective title in the grantor, it was held, that he could recover the price thereof in an action against the seller.³ So, also, although if A. should purchase a horse and a cow together for seventeen dollars, the contract would be entire; because there would be no means of determining the price, which was paid for either alone;⁴ yet if he should purchase them both together, agreeing to pay ten dollars for the horse, and seven dollars for the cow, the contract would be severable; and if the cow should die before delivery, the vendor would be compelled to pay ten dollars for the horse. In such a case, however, if the agreement should be,

¹ *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Perkins v. Hart*, 11 Wheat. R. 237; *Parish v. Stone*, 14 Pick. R. 198; *Planchè v. Colburn*, 5 Car. & Payne, 58; S. C. 8 Bing. R. 14; *Baldey v. Parker*, 2 Barn. & Cres. 37; *Price v. Lea*, 1 Barn. & Cres. 156.

² *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; S. C. 5 Dowl & Ryl. 228. See, also, *Wood v. Benson*, 2 Crompt. & Jerv. 94.

³ *Johnson v. Johnson*, 3 Bos. & Pull. 162.

⁴ *Miner v. Bradley*, 22 Pick. R. 459; *Johnson v. Johnson*, 3 Bos. & Pull. 162.

that the vendor should have both, or neither, the contract again would be entire, because the entirety of the consideration would be of the essence of the contract. So, also, where a parol contract was made, for the delivery of five hundred barrels of cider in parcels, at future periods, each to be paid for in a note on delivery, and several parcels were delivered from time to time, and all paid for except the last, it was held that the delivery and acceptance of each parcel made a several and distinct contract of sale of such parcel; upon each of which successively, each party had all the actions and remedies incident to a sale.¹ So, also, where several distinct lots of growing crops were knocked down to a bidder at an auction sale, and his name was marked against them in the catalogue of sale, it was held that a distinct contract arose for each lot.²

¹ *Seymour v. Davis*, 2 Sandf. Sup. Ct. R. 239.

² *Roots v. Lord Dormer*, 4 Barn. & Adolph. 77; *Emmerson v. Heelis*, 2 Taunt. R. 46. An opposite doctrine was, indeed, held by Lord Kenyon, in *Chambers v. Griffiths*, 1 Esp. N. P. R. 151, where a number of horses were set up at auction in separate lots, and the plaintiff bid off three of them, and it was held that the contract was entire, and as title could only be made to one lot, the plaintiff was not bound to keep it. But Lord Kenyon himself, in *Poole v. Shergood*, 2 Bro. Ch. Cas. 118, limited this doctrine. In this case there had been a contract to purchase several lots, to two of which a title could not be made, and Lord Kenyon decreed a specific performance *pro tanto*, saying, "he must take it for granted that these two lots were not so complicated with the others as to entitle the purchaser to resist the whole." See, also, *Drew v. Hanson*, 6 Ves. Jr. 675; *Roffey v. Shallcross*, 4 Madd. Ch. R. 122, note. The doctrine of Lord Kenyon, in *Chambers v. Griffiths*, was said by Lord Brougham, in *Casamajor v. Strode*, (1 Cooper Sel. Cas. 510; S. C. 8 Condén Ch. R. 516,) not to be sound. The rule Lord Brougham lays down, founds the entirety of the contract upon the question whether the circumstances showed that the purchaser would not have bought except in the expectation of receiving the whole. See 2 Kent Comm. Lect. 39, p. 470. *Barclay v. Tracy*, 5 Watts. & Serg. 45; *James v. Shore*, 1 Stark. R. 426; *Miner v. Bradley*, 22 Pick. R. 458. But see *Mills v. Hunt*, 17 Wend. R. 333; S. C. 20 Wend. R. 431; *Judson v. Wass*, 11 Johns. R. 525. See, also, Story on Contracts, § 21 to § 26; *Franklyn v. Lamond*, 4 Man. Gran. & Scott, 697.

§ 244. So, also, where an indefinite quantity or mass is sold at a certain price per measure, upon a warranty that it is of a certain quality, it would seem that the contract would be entire for each measure only, and severable in respect to the whole quantity; so that the vendee would be obliged to take so much as corresponded to the warranty; that is, it would seem to be an agreement to pay so much per measure for as much as satisfied the whole terms of the contract.¹ If, indeed, in such a case, there be a special agreement to take the whole quantity or nothing, it constitutes an essential consideration of the purchase, and the parties would be bound to abide by such agreement.² So, also, if the agreement were absolutely and unconditionally to take the whole of an indefinite quantity, without any warranty of quality, at a certain price per measure, the contract would be considered as an entirety; the measure being considered as a mere means of estimating the gross sum which should be paid.³ And the distinction between the cases where an indefinite quantity is actually bargained for, upon a warranty, and where the whole is bargained for absolutely and without condition, is, that in the latter case, the taking of the whole is absolute, and makes a necessary part of the contract; while, in the former case, the taking of the whole depends upon a condition, namely, that the whole shall comply with the warranty. If it do comply with the warranty, the contract is entire. But in case of a failure of warranty, the contract would be several; inasmuch as its very terms import a merely conditional sale of the whole, so that if the condition be not performed, the contract is modified and altered; and, also, because

¹ *Graham v. Jackson*, 14 East, R. 498; *Withers v. Reynolds*, 2 Barn. & Adolph. 882; *Mavor v. Pyne*, 3 Bing. R. 286; *Roots v. Lord Dormer*, 4 Barn. & Adolph. 77; *Bragg v. Cole*, 6 Moore, R. 114.

² *Symonds v. Carr*, 1 Camp. R. 361; *Dixon v. Hort*, 1 Selw. R. 109.

³ *Waddington v. Oliver*, 2 N. R. 61; Long on Sales, p. 178, 180, (Rand's ed.); *Symonds v. Carr*, 1 Camp. R. 361; *Walker v. Dixon*, 2 Stark. R. 281.

its terms afford a means of exactly estimating the value of the portion taken. But if there be no warranty, and no condition broken, the contract must be considered as entire and indivisible.¹ Analogous to these cases is the case where a horse-dealer sold two horses for one entire price, and warranted both to be sound; and it was held, that, as respected the warranty, the contract was several, and that the vendee was not obliged to keep the horse which did not answer to the warranty.²

§ 244 *a*. In the diversity of the cases upon this subject, it is difficult to lay down any clear rule. The distinctions adverted

¹ This is the only distinction between entire and several contracts, which seems to us to stand upon principle, and to harmonize the cases on this subject. The case of *Clark v. Baker*, 5 Metcalf, R. 452, is, indeed, in direct opposition to the doctrine of the text, and asserts, that the only distinction between an entire and a severable contract consists in the question whether the contract is one single bargain or a conglomeration of separate and independent bargains, having no relation to each other but that of time. Unquestionably, this is a sound distinction as far as it goes; but we think, with the utmost respect for the decision of so learned a bench, as that by which the decision was pronounced, that it does not quite explain the cases. It cuts the knot, but it does not untie it. The inclination of opinion, and the weight of the cases seem to require the distinction of the text, even did it not stand upon principle. It seems very doubtful, whether the rule proposed in *Clark v. Baker*, would subserve the interests of trade. At all events, it has never been practically adopted nor acted upon; and, if strictly enforced, it would probably overturn half the sales now daily made in a large city. See *Symonds v. Carr*, 1 Camp. R. 361; *James v. Shore*, 1 Stark. R. 426; *Roots v. Dormer*, 4 Barn. & Cres. 77; S. C. 1 Nev. & Mann. 667. The case of *Baldey v. Parker*, 2 Barn. & Cres. 40, was not intended by the Court to define an entire contract, but only to define what species of contract was referred to by the statute of frauds. All that is affirmed by that case, is, that the contract intended by the statute does not refer to each particular or portion of a contract, where many things are bought together, but refers to the whole contract, including the particulars. But whether such a contract as would be entire for all the purposes of the statute, would be entire in all respects, is not at all decided by that case. The question was merely on the interpretation of the statute.

² *Symonds v. Carr*, 1 Camp. R. 361.

to are the only means that suggest themselves to reconcile the cases. But, upon the whole, the weight of opinion and the more reasonable rule would seem to be, that where there is a purchase of different articles, at different prices, at the same time, the contract would be several as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter, or by the act of the parties. Where a bill of parcels is taken, and includes the articles bought, under one whole price, it would, if accepted, afford evidence of an intention by both parties to treat the contract as entire. And wherever the failure as to a part would materially defeat the objects of the contract, and would have affected the sale, had such failure been anticipated, the contract would be entire. This rule would found the interpretation of the contract on the intention of the parties, as manifested by their acts, and by the circumstances of the case.¹ Of course, if two articles be bought at the same time, under the agreement that one may be returned if it do not prove satisfactory, there would be no entirety of contract.²

§ 245. It is evident, that where the contract is entire, neither party can claim to rescind it in part, and enforce it in part, unless by agreement with the other party. If, therefore, no

¹ The doctrine of Lord Kenyon in *Chambers v. Griffiths*, 1 Esp. R. 151, (ubi sup.) was said by Lord Brougham, in *Casamajor v. Strobe*, (1 Cooper, Sel. Cas. 510; S. C. 8 Conden's Ch. R. 516,) not to be sound doctrine, and that Lord Eldon in the note to *Roffey v. Shallcross*, (4 Madd. Ch. R. 122, Phil. ed.) carried the rule too far the other way. The rule which he laid down, founded the entirety of the contract upon the question, whether the circumstances showed that the purchaser would not have bought except in the expectation of receiving the whole. See, also, 2 Kent, Comm. Lect. 39, p. 470; *Barclay v. Tracy*, 5 Watts. & Serg. 45; *James v. Shore*, 1 Starkie, R. 426; *Miner v. Bradley*, 22 Pick. R. 458. But see *Mills v. Hunt*, 17 Wend. R. 333; S. C. 20 Wend. R. 431; *Judson v. Wass*, 11 Johns. R. 525. See Post, § 480, 482.

² *Price v. Lea*, 1 Barn. & Cres. 156.

such agreement be made or necessarily implied by the conduct of the parties, each is liable to the other for the whole consideration, or for no part of it.¹ An entire contract may, however, by express or implied agreement, be apportioned and treated as a severable contract; and, in such case, if the full consideration be advanced, the surplus above the value of the portion accepted may be recovered. A consent, by either party, to treat the contract as several, will be implied in all cases where any act is done which is inconsistent with the recognition of the entirety of the contract. Thus, if a person order three parcels of goods for a certain price, he may refuse to accept one without the others; but if one only of them be sent, and he accept it, he cannot refuse the second, merely because the third is not sent; since, by his acceptance of one, he has consented to treat the contract as several for each of the parcels.² So, also, if he order twenty barrels of flour, or fifty bales of cotton, and only ten barrels of flour, or five bales of cotton be sent, and he nevertheless accept them, he cannot refuse to pay therefor.³

§ 215 *a*. But if upon an entire contract of sale a portion of the articles be accepted in the course of accepting the whole, and the circumstances do not impute a waiver of the exact performance of the entire contract, it must be wholly presumed

¹ McKnight *v.* Dunlop, 4 Barb. Sup. Ct. R. 41; Jennings *v.* Camp, 13 Johns. R. 94; Champlin *v.* Rowley, 13 Wend. R. 288; S. C. 18 Wend. R. 187.

² Champion *v.* Short, 1 Camp. R. 53.

³ Roberts *v.* Beattie, 2 Penn. R. 63. See, also, Coolidge *v.* Brigham, 1 Metcalf, R. 550; Taylor *v.* Hilary, 1 Crompt. Mees. & Rosc. R. 741; Long *v.* Preston, 2 Moore & Payne, 262; Wheeler *v.* Braid, 12 Johns. R. 363; Patmore *v.* Colman, 1 Crompt. Mees. & Rosc. 65; Carter *v.* Carter, 14 Pick. R. 424; Payne *v.* Whorle, 7 East, R. 274; Danforth *v.* Dewey, 3 N. Hamp. R. 79; Bradford *v.* Manly, 13 Mass. R. 139; Raymond *v.* Bearnard, 12 Johns. R. 274; Hurst *v.* Orbell, 8 Adolph. & Ell. 107; Conner *v.* Henderson, 15 Mass. R. 319.

by one party in order to found any right to recovery against the other party. Thus, in a contract of sale for the delivery of a specific quantity of any article of merchandise at a fixed day, *to be paid for when the whole is delivered*; if a part only be delivered, the vendor cannot recover therefor unless the delivery of the remainder was prevented by the vendee, or unless there are some peculiar circumstances in the case clearly indicating a waiver of the entirety of performance, the acceptance of a part being in such a case in no way inconsistent with the understanding that the whole should be delivered.¹

§ 245 *b*. Again, where a contract for an entire amount or number is coupled with a condition, that if the orderer do not approve of the articles sent upon trial, he shall be at liberty to return them, and the trial of them involve the consumption or destruction of those tried, the return of the remainder would be sufficient; for the certainty of the contract would be to this extent, at least, waived.² But in such a case the orderer cannot retain a portion and return the remainder, except the other party assent. But unless the actual number ordered be sent, the orderer might retain such portion as he chooses, and it would be incumbent on the other party to object if he did not agree to such a modification of the contract. Thus, where the defendant ordered of the plaintiff *two* dozen of Port and two dozen of Sherry, with the understanding, that if it were not approved he should return it; and the plaintiff sent him four dozen of Port and four dozen of Sherry; and the defendant was not satisfied with its quality, and returned the whole,

¹ *Paige v. Ott*, 5 Denio, R. 408; *Champlin v. Rowley*, 13 Wend. R. 258; *Mead v. Degolyer*, 16 Wend. R. 632; *Ketchum v. Evertson*, 13 Johns. R. 359. See, also, *McMillan v. Vanderlip*, 12 Johns. R. 165; *Jennings v. Camp*, 13 Johns. R. 94; *Read v. Moor*, 19 Johns. R. 337; *Sickels v. Pattison*, 14 Wend. R. 257; *Lantry v. Parks*, 8 Cowen, R. 63.

² *Hart v. Mills*, 15 Mees. & Welsb. 85; *Poullen v. Lattimore*, 9 Barn. & Cress. 259.

except one bottle of the Port and one dozen of the Sherry, with a letter to the plaintiff, in which he stated that his order was for two dozen of each kind of wine; that he should not have refused to keep the four dozen if the quality had suited him, but that as it did not, he returned the four dozen of Port, minus one bottle, which he had tasted, and three dozen of the Sherry: it was *held*, that the defendant was liable only for the price of the wine he actually kept.¹

§ 246. In the next place, as to Conditional Contracts. A conditional contract is an executory contract, the performance of which depends upon a condition. It differs from a purely executory contract in this particular: that an executory contract is absolutely to sell at a future time, and a conditional contract is conditionally to sell. In the one case, the performance of the contract is suspended and transferred to a future time; in the other case, the very existence and performance of the contract depends upon a contingency. Thus, if a man sell goods to B for so much as A shall name, the contract is not complete unless A names the price.

§ 247. A condition may be either precedent or subsequent.²

¹ Hart v. Mills, 15 Mees. & Welsb. 85.

² A condition precedent corresponds to the suspensive condition of the Civil and Scottish Law, and a condition subsequent to the resolutive condition. Mr. Brown, in his Treatise on Sales, says: "A condition resolutive, when it is accomplished, puts an end to the contract, but does not suspend its existence." "The contract is perfect, notwithstanding the presence of a condition subsequent, and is merely liable to be rescinded on the condition being accomplished." The effect of a proper suspensive condition, or condition precedent, in the contract of sale, is, that there is no complete sale until the condition is accomplished." So, also, Pothier, in his *Traité des Obligations*, No. 221, says: "Les conditions résolutoires sont celles, qui sont opposées, non pour suspendre l'obligation jusque à l'accomplissement, mais pour la faire cesser lorsqu'elles s'accomplissent. Une obligation contractée sous une condition résolutoire est donc parfait dès l'instant du contrat." See, also, Pothier, *Tr. des Oblig.* No. 198.

A condition precedent is one which must happen before either party becomes bound by the contract. As, if A promise to B, that if B will ship fifty barrels of flour by a particular vessel, he will buy twenty barrels ; or, if A agree to buy half of a certain cargo of B, on condition that B will buy the whole cargo of C. In these cases, the contract is incomplete until the fifty barrels are shipped by the particular vessel ; or, until the cargo is bought by B. So, also, sales of goods “on trial” are examples of this species of conditional sale.¹

§ 248. A condition subsequent is one which will defeat and annul the contract by the subsequent failure thereof.² As, if A agree to buy a particular estate of B, on condition that B shall not sell at any time thereafter the adjoining lot to C ; or, if goods be sold on condition that the purchaser shall, if they do not prove satisfactory, return them within an agreed time. So, also, sales on an express warranty are examples of this species of conditional sale.

§ 249. Other examples of conditional sales may be found in sales “on arrival,” and “on sale and return.” A sale on arrival, is a sale of goods expected from abroad, which is made before they arrive, the condition being, that the thing sold shall arrive, and that, if it do not arrive, the bargain shall be void.³ As, where the defendant sold to a plaintiff by a broker, “on arrival,” one hundred tons, more or less, of Teneriffe barilla, in the defendant’s ship Bon Fim, Tuan Feliciano, and the Bon Fim arrived without any barilla, the contract was held to be at an end, the condition having failed.⁴ A contract “on sale and

¹ Brown on Sales, § 44, 45 ; Com. Dig. Agreement, A. 4 ; *Ellis v. Mortimer*, 1 New R. 257 ; *Hayward v. Scougall*, 2 Camp. R. 56 ; *Hawes v. Humble*, 2 Camp. R. 327, n. ; *Boyd v. Siffkin*, 2 Camp. R. 326.

² Com. Dig. Condition, C. ; *Hayden v. Stoughton*, 5 Pick. R. 528.

³ *Shields v. Pettee*, 2 Sandf. Sup. Ct. R. 262.

⁴ *Hawes v. Humble*, cited 2 Camp. R. 327 ; *Boyd v. Siffkin*, 2 Camp.

return," is an agreement, by which goods are delivered by a wholesale dealer to a retail dealer, to be paid for at a certain rate, if sold again by the latter ; and if not sold, to be returned. Under such a contract, it has been held, that if no period of time be specified within which the goods must be returned, they must be returned within a reasonable time, or the sale will become absolute, and the vendor will be entitled to recover the price from the vendee. Reasonable time is of course dependent wholly upon the peculiar circumstances of each particular case.¹

§ 250. In sales of goods *on trial*, if any particular time be named within which they are to be returned, if not approved of, they must be returned within such time, or the contract will become binding by the resolution of the condition. Nor is it necessary, in such cases, that the vendee should give notice to the vendor, that the goods are satisfactory, for the fact that the time within which he was bound to return them has elapsed, establishes the contract.² Where, however, a person is allowed to take the subject-matter of sale for a definite period on trial, whatever conclusion he may arrive at in the intermediate time, he is not bound thereby, even though he express it to the other party, unless he return the goods, or unless such conclusion be accepted as final by the owner of the goods, or unless the circumstances plainly show a determination of the whole negotiation. Thus, where Ellis, having a horse to sell, offered him to Mortimer, and it was agreed that Mortimer should give thirty guineas for the horse, "if he liked him, and should take him a month upon trial ;" and Mortimer took the

R. 327 ; *Idle v. Thornton*, 3 Camp. R. 274 ; *Shields v. Pettee*, 2 Sandf. Sup. Ct. R. 262.

¹ *Bailey v. Gouldsmith*, Peake, N. P. C. 56 ; *Carter v. Carter*, 14 Pick. R. 424.

² *Humphries v. Carvalho*, 16 East, R. 45 ; *Ellis v. Mortimer*, 1 Bos. & Pull. N. R. 257. See Post, § 456.

horse, and Ellis having asked him, within the fortnight, how he liked the horse, he answered that he liked the horse, but not the price, upon which Ellis desired that if he did not like the price, he would return the horse; but Mortimer kept the horse ten days longer and then returned him within the month; it was held that he was not bound to take the horse, inasmuch as the facts did not show a complete determination of the contract by either party before the return of the horse, and as he was entitled, whatever might be the fluctuations of his opinion, to try the horse for a month.¹ In sales of goods on trial where no particular time is fixed within which they are to be returned, if not approved of, the vendee will only be allowed a reasonable time in which to decide.

§ 251. Where the condition is precedent, it must be strictly performed in order to entitle the party, whose duty it is to perform it, to enforce the contract against the other party,² whether the non-performance of it, according to its terms, operate as an injury to the other party or not.³ Thus, where the price of certain goods to be manufactured, is to be paid by A on a day certain, in consideration that they shall be manufactured by B before that day, the performance by B is a condition precedent to his right to demand payment of A.⁴ So, also, the condition must be fully performed. And if a sale be made for a certain sum to be paid at a specified time, the payment of only a portion of the purchase-money is not sufficient.⁵ The plaintiff, therefore, in his declaration should aver perform-

¹ *Ellis v. Mortimer*, 1 Bos. & Pull. N. R. 257; *Reed v. Upton*, 10 Pick. R. 522.

² *Dana v. King*, 2 Pick. R. 155; *Seymour v. Bennet*, 14 Mass. R. 266; *Hunt v. Livermore*, 5 Pick. R. 395; *Albany Dutch Church v. Bradford*, 8 Cowen, R. 457; *Shaw v. Turnpike Co.*, 2 Penn. R. 454.

³ *Barber v. Taylor*, 5 Mees. & Welsb. 527.

⁴ *Johnson v. Reed*, 9 Mass. R. 78.

⁵ *Smith v. Foster*, 18 Vermt. (3 Washburn) 182.

ance, and must support it in his action by proof.¹ Nor does it make any difference, in this respect, that the condition is difficult, or foolish, for the party who engages to perform such a condition does so at his own risk, and must suffer the consequences.² But if the condition be illegal, or impossible, or repugnant, it will be void, and the sale will be absolute.³ It would seem, however, that a performance, according to the exact terms, and in the exact mode stated in the agreement, would not in all cases be necessary, but a substantial performance would be sufficient; provided, that no injury or inconvenience be thereby occasioned; and provided, also, that the exact mode of performance be not an essential consideration.⁴ Such cases must, however, be peculiar in their circumstances, and form exceptions to the general rule.

§ 252. No precise words, however, necessary to constitute a condition precedent, or a condition subsequent; and, if there be any question in this respect, it is to be determined by the intention of the parties, as indicated by the circumstances of the particular case.⁵ The exact meaning of the terms used may be warped so as to harmonize them with the manifest intention of the parties. Thus, where A agreed to sell to B a certain quantity of hemp, which he expected in a certain ship, "on arrival;" it was held, that the parties manifestly meant by the phrase, "on arrival," on arrival of the hemp, and not of the ship, and that the contract must be construed accordingly.⁶ So, also,

¹ *Ibid.*; *Thorpe v. Thorpe*, 1 Salk. R. 171.

² *Worsley v. Wood*, 6 T. R. 720; Com. Dig. D. 1.

³ *Harvy v. Gibbon*, 2 Lev. R. 161; Story on Contracts, § 137, 140; *Nerot v. Wallace*, 3 T. R. 17.

⁴ *Worsley v. Wood*, 6 T. R. 720.

⁵ *Worsley v. Wood*, 6 T. R. 720; *Tufts v. Kidder*, 8 Pick. R. 537; *Johnson v. Reed*, 9 Mass. R. 78; *Gardiner v. Corson*, 15 Mass. R. 500, 503.

⁶ *Siffkin v. Boyd*, 2 Camp. R. 327. The broker's note, proved at the trial of this case, was in the following words: "Sold for Mr. H. Siffkin to Mr. M. Boyd about 32 tons more or less of Riga Rhine Hemp on arrival per

where a contract was made in London for the sale of tallow by a particular ship. "on arrival," and it was specified, that if it did not arrive before a given day, the bargain was to be void, and the ship was wrecked, but the cargo was saved, and might have been sent round to London by a different conveyance than the ship before such given day, but it was not; it was held, that the manifest intention of the parties was, that the contract should be void unless the tallow arrived in the ordinary course of trade and navigation, and that the sellers were not, therefore, answerable for a non-delivery thereof.¹

§ 253. Again, conditions may be implied, from the circum-

Fanny Almira, at £82 10s. per ton." The ship arrived, but the hemp did not arrive, and the action was brought against the vendors on the note. Lord Ellenborough said, in deciding, that the action was unmaintainable; "I clearly think, 'on arrival' means, on arrival of the hemp. The parties did not mean to enter into a wager. By 'bought and sold' in the note, must be understood 'contracted to sell and buy.' The hemp was expected by the ship; had it arrived, it was sold to the plaintiff. As none arrived, the contract was at an end." Lord Ellenborough seems to treat the contract as an executory contract of sale in one part of these remarks, and as a conditional sale in another part. But the fairest interpretation of the contract would seem to be, that the sale was absolute, with a condition subsequent or resolutive; that is, it was a present sale, with the condition that, if no hemp arrived, the sale was to be null. Lord Ellenborough says, "*had it arrived, it was sold*;" this is true, but yet it would not be true upon the supposition that there was a mere contract to sell, as he says it was. The condition was not precedent, for, provided that the hemp had arrived, it would not have become the property of the vendee at the time of the arrival; but it would have been his property from the time when the note was given. It was not necessary, before the property passed, that the condition should be performed, but it was agreed that, if a certain condition did not happen, the sale should be thereby defeated. In like manner, a person would buy an article on a warranty, or on trial, and if the condition should fail, the sale would be avoided; but it would yet have been a complete sale; so that if the vendee did not take advantage of the failure of the condition, no one could.

¹ *Idle v. Thornton*, 3 Camp. R. 274.

stances of a case, to be attached to sales where no condition has been expressly stated. Thus, if certain rules of sale, of which the buyer has notice, be posted at the place where goods are sold, the conditions stated therein will be considered as implied in every sale made there, to which they apply, although no express reference be made thereto in the contract of sale. Thus, where certain rules of sale were posted up at a repository for the sale of horses, regulating sales by private contract there ; it was held that, where the buyer had notice of them, he impliedly adopted them as the conditions of his bargain.¹

¹ *Bywater v. Richardson*, 3 Nev. & Man. 748 ; 1 Adolph. & Ell. 508.

CHAPTER VIII.

OF THE STATUTE OF FRAUDS, AS APPLICABLE TO A CONTRACT
OF SALE.

§ 254. THE next question which demands our attention, is in respect to the form in which a contract of sale is required to be made.

§ 255. The simplest form which this contract assumes is, where there is a reciprocal manual transfer of the subject-matter of the sale and of the price. By such a proceeding, the transaction is completely closed, so that neither party can avoid it, or enforce any claim growing out of the sale against the other, nor reclaim the consideration, unless the sale be fraudulent, or, unless there be a failure of warranty. The rules relating to such a sale *in præsenti*, are plain and simple. But, inasmuch as an executory sale may be made, in which the subject-matter is to be delivered, or the price is to be paid at some future time, or which requires the performance of some acts by the seller, before delivery can be actually or legally made, it becomes necessary to consider the formalities which are required by the Statute of Frauds, in order to render such a contract binding.

§ 256. The Statute of Frauds, which has been supposed to have been framed by Sir Matthew Hale, and which was pronounced by Lord Ellenborough to be "one of the wisest laws in our statute books," is not, as it would appear from the case

of *Ash v. Abdy*,¹ the production of Lord Hale, but was originally introduced by Lord Nottingham into the House of Lords in a different form, and was subsequently there altered and patched by the judges and civilians until it was moulded into its present shape. By dint of construction, however, its inaccuracies have been generally practically corrected, so that, in its operation, it fully justifies the large commendation of Lord Ellenborough, and serves the purpose set forth in the preamble, "of preventing many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury." With some slight variations, it has been re-enacted in nearly all of the States in the United States.

§ 257. The fourth and seventeenth sections of this statute, are alone applicable to the subject now under consideration. The fourth section enacts, "that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." In the interpretation of the term, "agreement," as used in this section, there has been much controversy, whether it was to be understood as signifying merely a promise or undertaking by one party, and only requiring, therefore, a statement of the consideration on one side; or, whether it was to be interpreted as meaning a mutual bargain, or contract between the parties, requiring a statement of the consideration on both sides. The latter interpretation, is, however, now settled to be the correct one. The memorandum or note of the agreement should, therefore, set forth both the promise and the consideration, either by its own contents, or by reference to something ex-

¹ 3 Swanst. R. 664.

trinsic, by which it may be rendered certain; it should be signed by one of the parties; and the name of the other should appear on it.¹ That is to say, the note or memorandum must afford full evidence that the agreement was not without a valuable consideration on both sides, and that it was between two or more certain parties; since, otherwise, although the memorandum might indicate plainly a promise, it might, nevertheless, be one which could not be enforced for want of sufficient consideration.² It is not, however, necessary, that the exact consideration should be expressed, provided that it clearly appear, that the consideration is legally sufficient. Whether that consideration were or were not performed is merely matter of

¹ The first case on this subject was *Wain v. Warlters*, 5 East, R. 10, which was subsequently modified by the case of *Stapp v. Lill*, 1 Camp. R. 242, and 9 East, R. 348, and finally reviewed and affirmed in *Saunders v. Wakefield*, 4 Barn. & Ald. 595. See, also, *Lyon v. Lamb*, Fell on Merc. Guar. 318; *Morris v. Stacey*, Holt, N. P. R. 153; 2 Stark. Evid. 349; *Champion v. Plummer*, 4 Bos. & Pull. 252; *Wheeler v. Collier*, 1 Mood. & Malk. 123; *Boys v. Ayerst*, 6 Madd. R. 316; *Jenkins v. Reynolds*, 2 Ball & Beat. 14; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Morley v. Boothby*, 3 Bing. R. 107; *Lees v. Whitcomb*, 5 Bing. R. 34; *Cole v. Dyer*, 1 Cromp. & Jerv. 461; *Newbury v. Armstrong*, 6 Bing. R. 201; *James v. Williams*, 3 Nev. & Man. 196; 5 Barn. & Adolph. 1109; *Laythoarp v. Bryant*, 3 Scott, R. 250; *Sears v. Brink*, 3 Johns. R. 210; *Rogers v. Kneeland*, 13 Wend. R. 114; *Peltier v. Collins*, 3 Wend. R. 459; see, also, *Egerton v. Matthews*, 6 East, R. 308, and note (1). But see *Ex parte Gardon*, 15 Ves. R. 287, 288. Under the statute of Virginia, which enacts, that "the *promise* or agreement shall be in writing," the consideration need not be stated in writing. *Violett v. Patton*, 5 Cranch, R. 142. In New York and South Carolina, the English doctrine obtains. *Sears v. Brink*, 3 Johns. R. 210; *Leonard v. Vredenburg*, 8 Johns. R. 29; *Stephens v. Winn*, 2 Nott & McCord, 372 (n.) So, also, in New Hampshire, *Nellson v. Sanborne*, 2 New Hamp. R. 414. In Massachusetts, New Jersey, and Maine, the consideration need not be stated. *Packard v. Richardson*, 17 Mass. R. 122; *Buckley v. Beardsley*, 2 South. R. 570; *Levy v. Merrill*, 4 Greenl. R. 180. So, also, in Connecticut, *Sage v. Wilcox*, 6 Conn. R. 81, and in North Carolina, *Miller v. Irvine*, 1 Dev. & Bat. 103.

² *Ibid.*

evidence.¹ The memorandum must, however, clearly acknowledge and approve a concluded bargain, and not be a mere statement of an intention to make one, in order to render it sufficient.²

§ 258. It will also be observed, that the agreement mentioned in the statute, as requiring a memorandum in writing, is “any agreement *that is not to be performed within the space of one year.*” An agreement, therefore, which is to be performed within the space of one year is not within the statute requisition, and is binding, although it be made verbally. So, also, where performance is dependent on a contingency, which is expected to happen within a year, a verbal agreement will be sufficient; although the contingency do not actually happen until the year has elapsed;³ as, if the agreement should be to pay a certain sum of money on the return of a certain ship, expected to arrive within a year, but which did not so arrive. But a complete performance of the agreement within the year, must be within the expectation of the parties, and be possible according to the terms of the contract, in order to take such a case out of the statute. And if the parties contemplate merely a partial performance within such time; or, if the terms of the contract manifest an intention not to complete it within such time, the statute applies, and a memorandum in writing is requisite.⁴ Thus, where A agreed verbally with B, that on con-

¹ Stapp v. Lill, 1 Camp, R. 242; 9 East, R. 348.

² Roberts v. Tucker, 3 Welsb. Hurls. & Gord. (Exchequer) R. 632.

³ Peter v. Compton, Skinn. R. 353; Anon. 1 Salk. R. 280; Smith v. Westall, 1 Ld. Raym. R. 316; Moore v. Fox, 10 Johns. R. 244; Ross on Vendors, 46; 2 Stark. Evid. 601; Blake v. Cole, 22 Pick. R. 97; Moore v. Fox, 10 Johns. R. 244; M'Lees v. Hale, 10 Wend. R. 426; Linscott v. McIntire, 3 Shepley, R. 201; Kent v. Kent, 18 Pick. R. 569; Russell v. Slade, 12 Conn. R. 445; Shute v. Dorr, 5 Wend. R. 201.

⁴ Fenton v. Emblers, 3 Burr. R. 1281; S. C. 1 W. Black. 350; Hinckley v. Southgate, 11 Vermont, R. 428; Drummond v. Burrell, 13 Wend. R. 327; Wells v. Horton, 2 Car. & Payne, 383; Boydell v. Drummond, 11 East, R. 112.

sideration that B would become his housekeeper, and take upon himself the care and management of his family, as long as it should please both parties, that he (A) would pay B wages at and after the rate of six pounds a year, and that, by his last will and testament, he would "give and bequeath to the plaintiff, (B) a legacy or annuity of sixteen pounds by the year, to be paid, and payable to her yearly, and for every year, from the day of the testator's death, for and during the term of her natural life;" it was held, that the agreement should have been made in writing.¹ So, also, where A proposed to publish, by subscription, a series of prints from Shakspeare's plays, to be issued in numbers, at the price of three guineas a number, two guineas being payable at the time of subscribing, and one guinea on the delivery of each number; and A agreed, that one number, at least, should be issued every year; it was held, that, as the complete performance of the contract was neither possible nor contemplated by the parties, it should have been in writing.²

§ 259. The seventeenth section of this same statute enacts, that "no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling,³ or upwards, shall be allowed to be good, except the buyer shall, (1.) accept part of the goods so sold, and actually receive the same; or, (2.) give something in earnest to bind the bargain, or in part payment; or, (3.) that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents, thereto lawfully authorized."

¹ *Fenton v. Emblers*, 3 Burr. R. 1281.

² *Boydell v. Drummond*, 11 East, R. 142.

³ The amount necessary to bring a contract within the provisions of this statute differs in the different States in the United States. In Massachusetts, it is fixed at \$50; in New York, at \$50; in Vermont, at \$40; in Maine, at \$30; in New Hampshire, at \$33.33. In Rhode Island, this provision has never been adopted.

§ 260. The first question, which arises in respect to this section, is as to the interpretation to be given to the phrase, "no contract for the sale," &c. The term "contract," as here used, embraces all contracts, in which the sale is to be completed by an immediate transfer of the commodity and price; and, also, all executory contracts for the future delivery of articles, existing at the time of the sale, in the same shape, as that in which they are to be delivered.¹ But its provisions do not apply to executory contracts for the future delivery of goods, after they shall be manufactured; or after certain work and labor shall be expended upon them, so as to change their condition.² Thus, where the defendant, at Nottingham, verbally agreed to sell to the plaintiff fifty quarters of wheat, to be delivered afterwards, at Gainsborough; it was held, that the defendant was not legally bound to deliver the wheat, the contract not being valid according to the requisitions of the Statute of Frauds.³ A similar decision was made, where the plaintiff verbally agreed to buy certain sheep of the defendant at Lewes Fair, and to take them away at a certain hour, and the defendant sold them to another person.⁴ But where the defendant ordered a chariot, which was not in existence, but was to be manufactured by the vendor; it was held, in an action for the

¹ *Rondeau v. Wyatt*, 2 H. Black. R. 63; S. C. 3 Brown, Ch. C. 154; *Alexander v. Comber*, 1 H. Black. R. 20; *Cooper v. Elston*, 7 T. R. 14.

² *Towers v. Osborne*, Str. R. 506; *Clayton v. Andrews*, 4 Burr. R. 2101. See, also, *Cooper v. Elston*, 7 T. R. 14; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surman*, 9 Barn. & Cres. 561; *Bennett v. Hull*, 10 Johns. R. 364; *Crookshank v. Burrell*, 18 Johns. R. 58; *Watt v. Friend*, 10 Barn. & Cres. 446; *Sewall v. Fitch*, 8 Cow. R. 215; *Jackson v. Covert*, 5 Wend. R. 139; 1 Kent, Comm. Lect. 39, p. 511, note (b); *Ross on Vendors*, p. 8, 9, 10; *Scymour v. Davis*, 2 Sandf. Sup. Ct. R. 239; *Gardner v. Joy*, 9 Metcalf, R. 177; *Spencer v. Cone*, 1 Metcalf, R. 283.

³ *Cooper v. Elston*, 7 T. R. 14; S. P. *Rondeau v. Wyatt*, 2 H. Black. R. 63.

⁴ *Alexander v. Comber*, 1 H. Black. R. 20. See, also, *Bennett v. Hall*, 10 Johns. R. 364.

value, that the contract was not within the statute of frauds.¹ So, also, where the defendant agreed to deliver a load and a half of wheat within three weeks or a month, the wheat being then unthrashed, the contract was held not to be such a contract of sale as was contemplated in the provisions of the statute.²

§ 260 *a*. There has, however, been a manifest desire in the later cases to escape as far as possible from this distinction. While it is admitted that the statute does not apply to executory contracts for the sale of goods not in existence, and to be manufactured to order,³ it has been held in several cases to apply to executory contracts of goods upon which labor is to be expended so as to render them deliverable or to change their condition. Thus, a contract for the purchase of three hundred sacks of flour, not ground, and to be prepared and shipped at a future day, was held to be a sale within the statute.⁴ So, also, a parol agreement to deliver four hundred barrels of cider at a future time, which the seller was to procure from farmers, and to refine, so as to fit it for market use, was held to be within the statute.⁵ And the same doctrine was held in the case of a sale of a crop *to be raised*, the seed not being put in the ground at the time of the contract.⁶ And in the case of a sale of

¹ Towers *v.* Osborne, 1 Strange, R. 506; Crookshank *v.* Burrell, 18 Johns. R. 58. See a limitation of the whole breadth of this decision in Cooper *v.* Elston, 7 T. R. 14, and in Rondeau *v.* Wyatt, 2 H. Black. R. 63.

² Clayton *v.* Andrews, 4 Burr. R. 2101; Groves *v.* Buck, 3 Maule & Selw. 178; Crosby *v.* Wardsworth, 6 East, R. 610. But see Garbett *v.* Watson, 5 Barn. & Ald. 613.

³ Towers *v.* Osborne, 2 Strange, R. 506; Groves *v.* Buck, 3 Maule & Selw. 178; Crookshank *v.* Burrell, 18 Johns. R. 58; Mixer *v.* Howarth, 21 Pick. R. 205; Sewall *v.* Fitch, 8 Cowen, R. 215; Downs *v.* Ross, 23 Wend. R. 273.

⁴ Garbutt *v.* Watson, 5 Barn. & Ald. 219; S. C. 1 Dowl. & Ryl. 219.

⁵ Seymour *v.* Davis, 2 Sandf. Sup. Ct. R. 239.

⁶ Watts *v.* Friend, 10 Barn. & Cres. 446; S. C. 5 Man. & Ryl. 939.

wheat which was to be threshed,¹ and of tallow which was to be manufactured.² The ground taken in these decisions, is

¹ *Downs v. Ross*, 23 Wend. R. 273. In this case, Mr. J. Bronson, in delivering the judgment of the Court said: "No part of the purchase-money was paid, none of the property was delivered, and there was no writing between the parties. If, then, this was a contract for *the sale of goods*, the statute declares it void. 2 R. S. 136, § 3. The substance of the transaction may be stated in few words. The merchant or miller went to the farmer to purchase his wheat, a part of which was already threshed and in the granary, and the residue was in a course of preparation for market. The farmer said he would clean over again that which was in the granary, continue threshing that which was still in the straw, and within six days would be ready to deliver seven or eight hundred bushels. A contract was concluded for the purchase of that quantity, to be delivered by a specified day, and to be paid for on delivery. In still fewer words, defendant sold his wheat, and agreed to deliver it in a merchantable condition. It is said that this was, either in whole or in part, a contract for *work and labor*, and so not within the statute. But I think it was neither more nor less than a contract of *sale*; and if we are not tied down by the commentaries with which the statute of frauds has been so heavily overlaid, the agreement must be declared void.

"It is not to be denied that a pretty large license was formerly taken in the construction of statutes. Refined and artificial distinctions were sometimes sanctioned for the purpose of taking cases out of the operation of legislative enactments, and a broad foundation was thus laid for the vast amount of legal controversy which has followed. It was said at Westminster Hall, more than seventy years ago, that the Statute of Frauds had not been *explained* at a less expense than one hundred thousand pounds sterling; and Chancellor Kent, at the time he wrote his Commentaries, thought the sum might then be put down at a million and upwards. 2 Kent's Comm. 513, note. These are both very safe estimates, and still the statute is not yet 'explained;' and it never will be, so long as it is held that a promise by the seller to thresh his grain, or to blow the chaff out of a bin of wheat before sending it to market, changes the contract of sale into an agreement for work and labor. Whatever may be the bearing of the earlier cases, the more recent decisions will not lead us into any such absurdity. If the thing sold exist at the time *in solido*, the mere fact that something remains to be done to put it in a marketable condition, will not take the contract out of the operation of the statute.

² *Lamb v. Crafts*, 12 Metcalf, R. 353, 356.

that such cases are essentially contracts of sale, and not contracts for labor and service. So, also, where the owner of trees, growing on his land, agreed to sell the timber of them at a cer-

"In *Towers v. Osborne*, 1 Strange, 506, it was held by Pratt, Ch. J., that the contract was not within the statute, because there was not to be an *immediate* delivery of the goods. This decision was followed by Lord Mansfield, in *Clayton v. Andrews*, 4 Burr. 2101. But the doctrine that the statute does not apply to *executory* contracts was entirely exploded in *Rondeau v. Wyatt*, 2 H. Black. 63; and that case has been followed ever since. *Cooper v. Elston*, 7 T. R. 14; *Bennett v. Hull*, 10 Johns. R. 364; *Jackson v. Covert*, 5 Wendell, 139. The statute has little to do with any other than executory contracts, and it might better be repealed, than to say that such agreements are not within its influence.

"The fact that the defendant was to deliver the wheat at another place, which probably enhanced the price which he was to receive, cannot aid the plaintiff's case. *Astley v. Emery*, 4 Maule & Selw. 262. The same fact will be found to have existed in many other cases; but it has never been held a sufficient ground for taking the contract out of the operation of the statute.

"Nothing remains but the fact that the wheat, though in existence, was not completely prepared for market at the time the contract was made. The cases to which we have been referred on this point, will not answer the plaintiff's purpose. With a single exception, they all relate to contracts for the sale of a thing *not then in existence*, but which was to be constructed or manufactured by the vendor. In *Towers v. Osborne*, 2 Strange, 506, the chariot which the defendant bespoke, was *not yet made*. So of the oak pins, in *Groves v. Buck*, 3 Maule & Selw. 178 — the wagon, in *Crookshank v. Burrell*, 18 Johns. R. 58 — the buggy, in *Mixer v. Howarth*, 21 Pick. 205 — and the nails, in *Sewall v. Fitch*, 8 Cowen, 215. These decisions, whether right or wrong, cannot affect the present question.

"The only case which can aid the plaintiffs, is *Clayton v. Andrews*, 4 Burr. 2101, where it was held, that a contract for the sale of *unthreshed* wheat, *to be delivered at a future day*, was not within the statute. The decision went upon the ground that the statute did not apply to *executory* contracts; and although that doctrine was expressly overruled in *Rondeau v. Wyatt*, 2 H. Black. 63, which has ever since been followed, yet such was the deference for the opinions of Lord Mansfield, that the courts struggled for a time to find out some other ground on which the decision could be supported. Lord Loughborough, in *Rondeau v. Wyatt*, said, 'there was some *work* to be performed, for it was necessary that the corn should be

tain price per foot, it was held that although the contract contemplated the cutting down and measuring of the trees, it was within the statute.¹

threshed before the delivery;’ but he was forced to admit that this was a ‘nice distinction.’ It was, indeed, so ‘nice’ that it did not occur to the mind of Lord Mansfield in making the decision, and has never, I believe, been sanctioned by any case in Westminster Hall. But on the contrary, when it became necessary to pass upon the point, the distinction was pronounced *absurd*, and the case of *Clayton v. Andrews*, in every possible view of it, was expressly overruled. *Garbutt v. Watson*, 1 D. & R. 219, and 5 B. & Ald. 613, S. C. The defendant agreed by parol for the purchase of three hundred sacks of flour *not then ground*, to be *prepared* and shipped at a future day. All the judges agreed, that the case of *Clayton v. Andrews* could not be supported, and held that the contract was within the statute. Best, J., said, it was ‘*purely a contract for the sale of goods. It is absurd to consider it as a contract for the sale of flour, and for so much work and labor to be performed for the buyer. It is no more than a contract for the sale of so much flour, the seller undertaking to put it into that condition in which he contracts to sell it.*’ This is a stronger case than the one at bar, for the flour had not been manufactured—it did not exist at the time of making the contract. This decision was followed up by *Smith v. Surman*, 4 Man. & Ryl. 455, and 9 Barn. & Cres. 561, S. C. The defendant agreed to purchase a quantity of timber of the plaintiff, and the contract was held within the statute, although a part of the trees were standing at the time of the bargain, and were afterwards to be cut by the vendor. Bayley, J., denied that it was ‘*a mixed contract for goods and chattels, and for work and labor to be bestowed and performed*’ by the vendor for the vendee. He said it was ‘*a contract for the future sale of the timber, when it should be in a fit state for delivery.*’ The vendor, in felling the timber and preparing it for delivery, was, in my opinion, doing work for *himself*, and not for the vendee.’ Little-*dale*, J., said, ‘*a contract for mere work and labor is not expressly mentioned, and may, therefore, not be within the statute; but where the contracting parties contemplate a sale of goods, although the subject-matter, at the time of making the contract, may not exist as goods, but is to be wrought into that state by the vendor’s bestowing work and labor upon his raw materials, that, in my opinion, is a case within the statute.*’ He added, ‘*it appears to me to be sufficient, if, at the time of the completion of the contract, the subject-matter be goods, wares and merchandises.*’ In *Watts v. Friend*, 5 Man. & Ryl. 439, and 10 Barn. & Cres. 416, S. C., the contract was for the sale of a

¹ *Smith v. Surman*, 9 Barn. & Cres. 561.

§ 260 *b*. Again, a distinction has been made in the case of a purchase from the manufacturer of goods which he is in the habit of making, when they are not manufactured specially to comply with the order, but are sold as part of the general stock, and it has been said, that in such a case the contract is essentially one of sale and not of labor and services, and is therefore within the statute. Where the contract is for a particular article, as a wagon, which is to be manufactured specifically for the orderer, it would undoubtedly not come within the statute; but where a certain amount of the general stock is ordered of the manufacturer, as a quantity of wheat or tallow, it has been said, that whether it exist in the ordered form at the time, so as to be susceptible of immediate delivery or not, it is equally within the terms of the statute, being a contract of sale and not of labor and services.¹

crop *to be raised* — the seed not having yet been put into the ground — and it was held void within the statute, for not being in writing.

“These cases show, that the English courts have got back again on to the firm foundation of reason and common sense. The statute of frauds is no longer a dead letter. We have never followed the case of *Clayton v. Andrews*, and have, therefore, no occasion for retracing our steps. Whether the decision in *Sewall v. Fitch*, 8 Cowen, 215, can be supported, is a question which need not now be considered. It is enough for the present, that it is not a case in point.” The Chief Justice concurred, but Cowen, J., dissented, and delivered an opinion.

¹ *Garbrett v. Watson*, 5 Barn. & Ald. 613. In this case Abbott, C. J., said: “In *Towers v. Osborne*, the chariot which was ordered to be made, would never but for that order have had any existence. — But here, the plaintiffs were proceeding to grind the flour for the purposes of a general sale, and sold this quantity to the defendant as part of their general stock. The distinction is indeed somewhat nice, but the case of *Towers v. Osborne* is an extreme case, and ought not to be carried further. I think this case was rightly decided, the contract being one for the sale of goods, and falling within the 17th section of the Statute of Frauds.” In *Lamb v. Crafts*, 12 Metcalf, R. 356, Shaw, Ch. J., said, “It was intimated, but not pressed, that this case was not within the Statute of Frauds, because the tallow was to be prepared or manufactured. But we think it very clear that this objection cannot prevail. The distinction, we believe, is now well understood.

§ 260 c. In this collision of authorities it is difficult to lay down the rule, but it would probably be held, that where the subject-matter of the contract was not to be created by manufacture, but being already in existence, was merely to be subjected to certain labor for the purpose of rendering it deliverable, or perhaps even of changing its character, the contract would be within the statute of frauds, it being essentially a contract of sale. In other words, where the labor and service was the essential consideration, as in the case of the manufacture of a thing not *in esse*, the contract would not be within the statute, where the labor and service was wholly incidental to a subject-matter *in esse*, the statute would apply.¹

§ 261. The terms "contract for the sale of any goods, wares, and merchandise, for the price of ten pounds," as used in this statute, are also held to include not only sales, where the price paid for a single article is above ten pounds, but also, sales, where several goods are bought at once; provided, that their total cost amounts to ten pounds; although the contract be for distinct articles, with a distinct price attached to each. The question always is, whether the total amount of sales made at one time is ten pounds, and not whether each article is sold for ten pounds. The whole transaction that takes place at one time is to be considered. Thus, where A went to the shop of B, a linen-draper, and contracted for the purchase of various articles, each of which was under the value of ten pounds; but the whole sales amounted to seventy pounds, and a sepa-

When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement. *Gardner v. Joy*, 9 Metcalf, 177; *Spencer v. Cone*, 1 Metcalf, 283; *Mixer v. Howarth*, 21 Pick. 205." See, also, 2 Kent, Comm. Lect. 39, p. 511, note b.

¹ See 2 Kent, Comm. p. 512, note (3d ed.) *Cason v. Cheely*, 6 Georgia, R. 554.

rate price was agreed upon for each article, and A marked some of the things with a pencil, and some were measured, and others he assisted to cut from larger bulks; and he then desired, that an account of the whole should be sent to him, which was accordingly sent, together with the goods, and A refused to receive them, it was held, that the purchases constituted one single contract within the meaning of the statute.¹

§ 262. Again, it follows from what has been said, that the terms "goods, wares, and merchandise," are restricted to such goods, wares, and merchandise, as are *in esse*, and capable of delivery, at the time of the sale; and, therefore, although nothing be required to be done by the vendor, yet, if a change of condition be required before delivery can be made, the sale will not come within the statute of frauds.² Thus, if the contract be to sell and buy a crop of growing grass when it shall be full grown; or, all the fruit in an orchard, when it shall have ripened; the sale will not be within the statute, although all the change which is to occur is spontaneous.³

§ 263. It has been doubted whether a contract for the sale of *stock* in an incorporated company, was a contract for the sale of "goods, wares, and merchandise," within the meaning of the statute, upon the ground that the statute only contemplated the sale of such articles as could be actually delivered and accepted. In the first case which arose on this subject, the twelve judges, before whom the question was argued, were

¹ Baldey v. Parker, 2 Barn. & Cress. 37. See Ante, 241, and note (1.) Elliott v. Thomas, 3 Mees. & Welsb. 176; Scott v. Eastern Counties Railway Co. 12 Mees. & Welsb. 38; Seymour v. Davis, 2 Sandf. Sup. Ct. R. 239.

² Seymour v. Davis, 2 Sandf. Sup. Ct. R. 239; Cason v. Cheely, 6 Georgia, R. 554. But see Ante, § 260 et seq.

³ Crosby v. Wardsworth, 6 East, R. 610; Emmerson v. Heelis, 2 Taunt. R. 38.

not, therefore, whether the name of the party to be charged appear as a superscription, or as a signature, or be contained in the body of the memorandum; provided it be so distinctly set forth as to avoid all uncertainty.¹ Thus, it will be sufficient, if the memorandum commence, "I, A B, agree," and no signature be added at the conclusion;² or, if the party merely sign his initials.³ Again, it does not matter whether it be actually written by the party, or by another person; or whether it be in a printed form,—as, if a bill of parcels, or a shop-bill be given; provided that the party to be charged expressly or impliedly assent to its terms, and know that it is given.⁴ Thus, where a broker, employed to make a purchase, noted in his book the names of the parties and the terms of the sale, in the presence of the vendor and with his assent, the memorandum was held to be sufficient.⁵ But, where the name of the party has not been signed by him, and only appears in the body of the paper, he will only be bound upon the supposition, that he intended to bind himself thereby; and if the facts of the case disprove such a supposition, he will not be bound.⁶

§ 267. Again, the memorandum may be signed by any "agent, thereunto lawfully authorized." All that is required

¹ *Johnson v. Dodson*, 2 Mees. & Wels. 653; *Schneider v. Norris*, 2 Maule & Selw. 286; *Proper v. Parker*, 1 Russ. & Mylne, 625; *Knight v. Crockford*, 1 Esp. R. 190; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Stokes v. Moore*, 1 Cox, R. 219; *Selby v. Selby*, 3 Meriv. R. 2; *Ogilvie v. Foljambe*, 3 Meriv. R. 53; *Penniman v. Hartshorn*, 13 Mass. R. 87.

² *Proper v. Parker*, 1 Russ. & Mylne, 625; *Knight v. Crockford*, 1 Esp. R. 190; *Phillimore v. Barry*, 1 Camp. R. 513.

³ *Phillimore v. Barry*, 1 Camp. R. 513.

⁴ *Schneider v. Norris*, 2 Maule & Selw. 286; *Batturs v. Sellers*, 5 Harr. & Johns. R. 117.

⁵ *Merritt v. Clason*, 12 Johns. R. 102, affirmed, 14 Johns. R. 484.

⁶ *Johnson v. Dodgson*, 2 Mees. & Welsb. 653; *Long on Sales*, (Rand's ed.) 57; 2 Stark. Evid. Fraud, Stat. of, p. 602.

equally divided.¹ But in two cases, afterwards decided in chancery, the better opinion seemed to be, that the terms, "goods, wares, and merchandise," include shares in incorporated companies.² This opinion is also confirmed in this country by the decision of the Supreme Court of Massachusetts.³

§ 264. It was also formerly doubted, whether sales by auction were intended to be included within the statute, on account of the publicity with which such sales are made. It was argued that the statute was enacted for the purpose of preventing perjury, and subornation of perjury, and that, as the publicity of a sale at auction precluded all possibility of perjury as to the fact of the sale, it could not have been intended to be included within the terms of the statute. This opinion, which was first promulgated by Lord Mansfield,⁴ has not, however, met with the approbation of subsequent judges. Indeed, the argument seems to be too broad, and to apply equally to all public sales, or sales in market overt; and if it be once admitted that the publicity of a sale renders the positive requisition of the statute unnecessary to a particular case, the great question will be in every case as to the degree of danger of perjury; and this would be to render the statute useless, if not injurious, and to open the door to great uncertainty and indefiniteness of construction. It has, therefore, been considered, that sales by auction are within the statute.⁵

- ¹ *Pickering v. Appleby*, Comyn, R. 354.
- ² *Mussell v. Cooke*, Prec. in Chan. 533; *Cruik v. Dodson*, Sel. Cas. in Ch. 41.
- ³ *Tisdale v. Harris*, 20 Pick. R. 13. See, also, 2 Stark. on Evid. 608; 4 Wheat. R. 89, note; *Coll v. Netterville*, 2 P. Wms. R. 307; *Anon.* 1 P. Wms. R. 267; *Ford v. Sheldon's case*, 12 Co. R. 1; *Chitty on Contracts*, 387, note (v). But see *Brumbell v. Mitchell*, P. & Dav. 141; *King v. Capper*, 5 Price, 217; *Wildman v. Wildman*, 9 Ves. R. 177.
- ⁴ *Simon v. Melvill*, 1 W. Black. R. 599; S. C. 3 Burr. R. 1921. See, also, Post, § 267.
- ⁵ *Hinde v. Whitehouse*, 7 East, R. 568; *Buckminster v. Harrop*, 13 Ves.

§ 265. We now come to the three exceptions in this section, which, for the sake of convenience and clearness, it will be best to consider in their inverse order. The third exception is, "that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." It will be observed that this section differs from the fourth section in this respect, that it requires a "memorandum of the bargain," and not of "the agreement;" and that it is to be signed by the *parties* to be charged. The difficulty which embarrassed the construction of the term "agreement," has, therefore, been avoided in this section, by the use of the term "bargain." The memorandum required by this section, has accordingly been determined to be a memorandum of the names of the parties, of the terms of the contract, and of the subject-matter of the sale.

§ 266. And first, as to the names of the parties. The names of both buyer and seller must distinctly appear in the memorandum; but the signature of neither party is indispensable. Yet, if it be signed by the party to be charged, it will be sufficient, although the other party may not have signed it. All that the statute is understood to require, is, that the memorandum shall contain a distinct and clear statement of the terms of the agreement, and of the names of the parties.² It matters

R. 436; Kenworthy v. Schofield, 2 Barn. & Cress. 945; Walker v. Constable, 1 Bos. & Pull. 306.
¹ Champion v. Pummer, 1 N. R. 154; Egerton v. Matthews, 6 East, R. 307; Laythorpe v. Bryant, 3 Scott, R. 250; Weighman v. Caldwell, 4 Wheat. R. 85, note; Allen v. Bennett, 3 Taunt. R. 169; Western v. Russell, 3 Ves. & Beam. 192; Martin v. Mitchell, 2 Jac. & Walk. 426; Flight v. Bolland, 4 Russ. R. 298; Ballard v. Walker, 3 Johns. Cas. 10; Palmer v. Scott, 1 Russ. & Mylne, 391; Seton v. Slade, 7 Ves. R. 265; Clason v. Bailey, 14 Johns. R. 487; 2 Kent, Comm. Lect. 39, p. 510; Long on Sales, 54; Russell v. Nicoll, 3 Wend. R. 112.
² Ibid.; Bailey v. Ogden, 3 Johns. R. 399; Penniman v. Hartshorn, 13 Mass. R. 87.

in order to empower an agent to make a sufficient signature, is, that he should be recognized by the parties, or party, for whom he acts as their or his agent. It is neither necessary that he should be appointed by a written instrument, nor that he should be a special agent; but it is sufficient, if he be either appointed by parol, or be a general agent.¹ So, also, although the person signing be not authorized, yet if his authority be subsequently recognized, and adopted by both parties, or by the party for whom he acts, it is sufficient.² Thus, an auctioneer is considered as the agent of both parties for the purpose of making the memorandum, and an entry by him in his book will bind the parties.³ So, also, his clerk, who is present, and takes the terms of the sale from the dictation of the auctioneer, is a sufficient agent.⁴ But if his clerk be not present at the time of the sale, and make the entry by dictation of the auctioneer, the auctioneer cannot afterwards delegate to the clerk a power to make a memorandum; for the reason why it is ever considered sufficient, is, that it is done by him in the presence and with the implied consent of the purchaser, and when the reason fails, the rule fails.⁵ So, also, an entry by the broker in his books, or the delivery by him of bought and sold notes, is a sufficient memorandum; unless the terms of the contract are not sufficiently stated therein; or unless the notes disagree.⁶ But if the notes do not correspond with each

¹ *Coles v. Trecothick*, 9 Ves. R. 250; *Rucker v. Cammeyer*, 2 Esp. R. 105; *Chapman v. Partridge*, 5 Esp. R. 256; *Anon. Lofft*, R. 332.

² *Maclean v. Dunn*, 4 Bing. R. 722; *S. C.* 1 Moore & Payne, 671.

³ *Williams v. Millington*, 1 H. Black. R. 85; *Emmerson v. Heelis*, 2 Taunt. R. 38; *White v. Proctor*, 1 Jac. & Walk. 350; *M'Comb v. Wright*, 4 Johns. Ch. R. 659; *Bird v. Boulter*, 4 Barn. & Adolph. 440; *Post*, § *Sales by Auction*; *Ante*, § 79, 80.

⁴ *Wright v. Dannah*, 2 Camp. R. 203; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Henderson v. Barnwell*, 1 Younge & Jerv. 389. *Post*, § 467.

⁵ *Ibid.*; *Alna v. Plummer*, 4 Greenl. R. 458; *Henderson v. Barnwell*, 1 Younge & Jerv. 389.

⁶ *Rucker v. Cammeyer*, 1 Esp. R. 105; *Hinde v. Whitehouse*, 7 East,

other, or with the entry in his books, the memorandum would be insufficient, unless the want of correspondence be occasioned by a mistake, which prejudices neither party.¹ Nor can a material variation between the notes be corrected by the entry in the books of the broker. Thus, where a broker, employed by the plaintiff to sell St. Petersburg clean hemp, and by the defendant to buy hemp, sold to the defendant, and gave him by mistake a note of Riga Rhine hemp, and gave the plaintiff a sold note of Petersburg clean hemp, the two species of hemp being naturally different ; it was held, that no contract existed through want of a sufficient memorandum.²

§ 268. The agent must, however, appear in the suit as a third person, and not as one of the parties thereto ; and, therefore, if the auctioneer make the memorandum, he cannot sue in his own name on it ; although he may, if his clerk make the memorandum. All questions, however, relating to the power of an agent to act for his principal, come under the general rules of agency, of which it is not the province of this work to treat. We have, however, already had occasion to consider some general principles, relating to agency and to the powers of Factors, Brokers, Auctioneers, and Ship-Masters, to which the reader is referred.³

R. 558 ; *Kemble v. Atkins*, 7 Taunt. R. 260 ; *Dickenson v. Lilwal*, 1 Stark. R. 128 ; *Henderson v. Barnwell*, 1 Younge & Jerv. 389 ; *Clayson v. Bailey*, 14 Johns. R. 584.

¹ *Ibid.* ; *Thornton v. Kempster*, 5 Taunt. R. 786 ; *Mitchell v. Lapage*, Holt, N. P. R. 253 ; *Bird v. Boulter*, 4 Barn. & Adolph. 413 ; *Davis v. Shields*, 26 Wend. R. 311 ; *Cumming v. Roebuck*, Holt, N. P. R. 172.

² *Thornton v. Kempster*, 5 Taunt. R. 786. See, also, *Roe v. Osborne*, 1 Stark. R. 140.

³ Ante § 79, 118. See, also, *Bird v. Boulter*, 4 Barn. & Adolph. 466 ; *Sewall v. Fitch*, 8 Cowen, R. 215 ; *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

§ 269. Again, the terms of the contract should be so set forth in the memorandum, as to be completely intelligible without resort to verbal testimony; for, otherwise, the very design of the statute would be frustrated.¹ Verbal testimony would, of course, be admissible to prove, whether the terms of the contract have been complied with, and how far they have been observed, and in what sense they were used by the parties, and what was their technical meaning;² but not to prove what they were.³ We have already seen, that this rule applies even to sales by auction, in which the requisitions of the statute must be strictly complied with, although the publicity of such sales would render it easy to prove their terms by parol evidence.⁴ Thus, where a carding machine was sold at auction, and the auctioneer put down the purchaser's name in the catalogue only, which contained no reference to the conditions of sale; it was held that this was not a sufficient memorandum of the bargain to satisfy the requisitions of the statute.⁵

§ 270. So, also, if a specific price be agreed upon by the parties, it should be stated in the memorandum, because it forms an essential portion of the bargain. But if no definite price be agreed upon by the parties, it cannot, of course, be stated in the memorandum, and the law will, therefore, imply,

¹ *Hoadley v. McLaine*, 10 Bing. R. 482; S. C. 4 Moore & Scott, 340; *Elmore v. Kingscote*, 5 Barn. & Cres. 583; *Acebal v. Levy*, 10 Bing. R. 382; *Cooper v. Smith*, 15 East, R. 103.

² *Birch v. Depeyster*, 4 Camp. R. 385; Phillips & Amos on Evid. p. 738, 739 (edit. 1838); *Johnston v. Osborne*, 11 Adolph. & Ell. 549.

³ *Kain v. Old*, 2 Barn. & Cres. 627; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 280; *Abeel v. Radcliff*, 13 Johns. R. 297; *Goss v. Nugent*, 5 Barn. & Adolph. 58; *Stowell v. Robinson*, 3 Bing. N. S. 928; *Harvey v. Grabham*, 5 Adolph. & Ell. 61; 2 Kent, Comm. Lect. 39, p. 498, 511; *Ford v. Yates*, 2 Mann. & Gran. R. 549.

⁴ Ante, § 267; *Walker v. Constable*, 1 Bos. & Pull. 306.

⁵ *Kenworthy v. Schofield*, 2 Barn. & Cres. 945.

that a reasonable price was agreed upon.¹ Thus, where the plaintiff ordered a chariot to be built by the defendant, and no definite price was agreed upon, nor expressed in the memorandum; it was held that the contract was binding; and that the plaintiff must be understood as agreeing to pay the reasonable value of the chariot; although, had a particular price been agreed upon, it should have been stated.² The reason of this distinction is manifest. The object of the statute is to render the terms of the sale certain, and thereby to avoid perjury and mistake. If the price be fixed by positive agreement, it is thereby rendered certain, and should be stated so as to prevent any mistake. If, therefore, it be shown, by parol evidence, that there is an agreement for a specific price, the seller cannot, on producing a note in writing, which is altogether silent as to price, recover on account for a *quantum valebant*.³ But if the price be not fixed by the parties, the law fixes it, by implication, to be the worth of the articles, or the market price, and thus uncertainty is as completely avoided in the one case as in the other. To state, in the memorandum, that the party ordering agreed to pay a reasonable price, no definite price being agreed upon, would be useless; since the law will imply such a bargain where nothing is said.⁴

¹ *Kain v. Old*, 2 Barn. & Cres. 627; *Elmore v. Kingscote*, 5 Barn. & Cres. 583; *Kenworthy v. Schofield*, 2 Barn. & Cres. 947.

² *Hoadley v. McLaine*, 10 Bing. R. 482; 4 Moore & Scott, 340; *Boydell v. Drummond*, 11 East, R. 142.

³ *Acebal v. Levy*, 10 Bing. R. 383; *Elmore v. Kingscote*, 5 B. & C. 583; *Cooper v. Smith*, 11 East, R. 103.

⁴ There is, however, great diversity of opinion as to whether the "consideration" should be stated in the memorandum. The English rule requires that it should be stated. See *Wain v. Warlters*, 5 East, R. 10, reviewed and confirmed in *Saunders v. Wakefield*, 4 Barn. & Ald. 595. This rule is also followed in New York (*Sears v. Brink*, 3 Johns. R. 210; *Leonard v. Vredenburg*, 8 Johns. R. 29); and in South Carolina (*Stephens v. Winn*, 2 Nott & McCord, 372 n.); and in New Hampshire (*Neelson v. Sanborne*, 2 N. Hamp. R. 414). But the contrary rule is

§ 271. Where there are particular conditions affixed to a sale, a memorandum of the sale, which does not set forth or refer to such conditions, will not be sufficient under the statute. If, therefore, in a sale by auction, there be printed particulars or conditions of sale, a mere signing of the catalogue, in which the prices are marked against the goods purchased, will not be sufficient, unless the conditions are annexed thereto, or are also signed.¹

§ 272. It is not, however, necessary, that the whole terms of the contract should appear on any one paper; for, if they can clearly and definitely be collected from the correspondence of the parties; or from any two papers referring to each other, or manifestly referring to the same contract, there will be a sufficient memorandum, within the meaning of the statute. Thus, a bill of parcels, in which the name of the vendor is printed, may be connected with and explained by a subsequent letter written by the vendor to the vendee, in relation to the same transactions.² So, also, an order for goods written and signed by the vendor in a book of the vendee's, but not stating the vendee's name, may be connected with a letter from the vendor to his agent, recognizing the contract, and stating the name of the vendee.³ So, where an agreement was made for the sale of an estate, and it was reduced to writing, prepara-

adopted in Massachusetts (*Packard v. Richardson*, 17 Mass. R. 122); and in Maine (*Levy v. Merrill*, 4 Green. R. 180); and in Connecticut (*Sage v. Wilcox*, 6 Conn. R. 81); and in New Jersey (*Buckley v. Beardsley*, 2 South, R. 570); and in North Carolina (*Miller v. Irvine*, 1 Dev. & Bat. 103). See, also, *Violett v. Patton*, 5 Cranch, R. 142; *Taylor v. Ross*, 3 Yerg. 330; 3 Kent, Comm. 132.

¹ *Hinde v. Whitehouse*, 7 East, R. 558.

² *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Bradford v. Manly*, 13 Mass. R. 139; *Whitwell v. Wyer*, 11 Mass. R. 6.

³ *Allen v. Bennet*, 3 Taunt. R. 169; *Johnson v. Dodgson*, 2 Mees. & Welsb. 653; *Jackson v. Lowe*, 1 Bing. R. 9; S. C. 7 Moore, R. 219; *Dobell v. Hutchinson*, 3 Adolph. & Ell. 355.

tory to signing, but was never signed; but the defendant admitted himself to be bound by it, in a letter written to the plaintiff; it was held that it was a sufficient compliance with the requisitions of the statute.¹ So, also, where the purchaser at auction signed a memorandum of the contract, which was indorsed on the particulars and conditions of sale, and referred to them, and afterwards wrote to the seller complaining of a defect of title, and the seller wrote, in return, letters containing some of the conditions of the sale, and the name of the parties, and specifying the property sold; it was held that these letters might be corrected with the particulars and conditions of sale signed by the purchaser, so as to make a sufficient memorandum under the statute.² Wherever, indeed, a letter or letters pass between the parties, referring to their agreement, if the whole terms of the sale can be collected therefrom, the object of the statute is answered, and the statement of the terms therein contained, is considered as a sufficient memorandum.³ But in all cases, where the agreement is to be collected from different papers, no room must be left for doubt that they all refer to the same agreement; and, therefore, it should appear from intrinsic evidence in the papers, that such is the fact.⁴ So, also, the papers should contain proof of the *whole* agreement, and omissions cannot be supplied by parol evidence, since this would be to frustrate the

¹ *Tawney v. Crowther*, 3 Bro. Ch. Cas. 319.

² *Dobell v. Hutchinson*, 3 Adolph. & Ell. 355. See, also, *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *S. C.* 3 Scott, R. 238. See, also, *D'Wolf v. Rabaud*, 1 Peters, S. C. R. 476; *Barry v. Coombe*, 1 Peters, S. C. R. 640; *Givens v. Colder*, 2 Dess. R. 188.

³ *Coles v. Trecothick*, 9 Ves. R. 250; *Fowle v. Freeman*, 9 Ves. R. 315; *Tawney v. Crowther*, 3 Bro. Ch. R. 319, and cases cited in Perkins's ed.

⁴ 1 Starkie on Evid. 603; Greenl. on Evid. § 268; Chitty on Contracts, 314, 316; *Boydell v. Drummond*, 11 East, R. 142; *Sandilands v. Marsh*, 2 Barn. & Ald. 680; *Coles v. Trecothick*, 9 Ves. R. 250; *Tawney v. Crowther*, 3 Bro. Ch. Cas. (by Eden), 320, note (a).

object of the statute.¹ So, also, it must appear from a fair interpretation of the papers, that they import a *concluded agreement*, and not a mere treaty between the parties.²

§ 273. We now come to the second exception, mentioned in the seventeenth section ; namely, the giving something in *earnest*, or in part payment, to bind the bargain. This exception was founded upon an old custom, common in England at the time when this statute was enacted, for the purchaser to pay a small portion of the purchase-money, in token of the conclusion and ratification of the sale.³ Some formal act, by which conclusive assent is manifested to the terms of a bargain has been common to all countries, and in all ages. The Jew plucked off one shoe, and gave it to his neighbor.⁴ The people of the northern nations shook hands.⁵ The Indian smokes a pipe. The Civil Law recognized two kinds of earnest, symbolical and pecuniary ; the one being a transfer of something, by way of pledge or assurance ; and the other being a payment of part of the purchase-money.⁶ A similar distinction seems to be intimated by the form in the statute, by the use of the term part payment, as being different from earnest ; but it does not seem to have been heeded practically. This exception has, however, been of no use ; and only one case has occurred, to which it has ever applied. That case related to the purchase of a horse, where the purchaser produced a shil-

¹ Ibid. ; Greenl. on Evid. § 268, p. 306, and note (1).

² *Coles v. Trecothick*, 9 Ves. R. 250 ; *Tawney v. Crowther*, 3 Bro. Ch. Cas. 320, note (a) ; *Fowle v. Freeman*, 9 Ves. R. 315 ; *Rose v. Cunningham*, 11 Ves. R. 550 ; *Ogilvie v. Foljambe*, 3 Meriv. R. 62. See cases collected in Sugd. on Vend. & Purch. 74 ; *Clinan v. Cooke*, 1 Sch. & Lefr. 37 ; *Huddleston v. Briscoe*, 11 Ves. R. 591 ; *Stratford v. Bosworth*, 2 Ves. & Beam. 341 ; *Card v. Jaffray*, 2 Sch. & Lef. 384.

³ Noy, Max. c. 42 ; 2 Black. Comm. 447.

⁴ Ruth, ch. iv. vs. 7, 8, 9.

⁵ Bracton, l. 2, c. 27. So, also, in the Roman Law. Inst. L. 3, tit. 24.

⁶ Code Civile, 1590 ; Vinnius, Comment. in Inst. l. 3, tit. 24.

ling from his pocket, and drew it across the hand of the seller's servant, and then returned it to his own pocket ; and it was held, that this act, (which is a custom in the north of England, and is called striking a bargain,) was not sufficient to satisfy the requisitions of the statute.¹ The only rule, therefore, which has been adjudged in respect to this part of the exception, is, that there must be an actual payment of a portion of the price, and not a fictitious ceremony.

§ 273 *a*. The part payment required by the statute must take place at the time when the bargain is made, or at some subsequent time. And an agreement to accept, as part payment, a debt before due from the vendee, independent of the transaction, does not satisfy the statute, for this is nothing more than a payment of the previous debt in part of the goods, with a sale of the remainder. In such a case the discharge of the debt is a portion of the contract itself, and is not an act of part payment done in furtherance of it, and therefore is open to all the objections which the statute was intended to prevent. But if, subsequently to the making of the contract, an arrangement is made by which the vendor agrees to accept, as part payment, a debt due to him from the vendee, it would be sufficient to take the case out of the statute.²

§ 274. Earnest is, however, only a ratification of the contract, and entitles neither party to any rights independent of their agreement. Its effect is only to bind the bargain, and not to change the title.³ The buyer has, therefore, a right to take the goods, only upon condition that he pays the agreed price for them. And the seller can only claim the purchase-money,

¹ *Blenkinsop v. Clayton*, 7 Taunt. R. 597.

² *Walker v. Russey*, 16 Mees. & Welsb. 302. See, also, *Hart v. Nash*,

³ *Crompt. Mees. & Rosc.* 337 ; *Hooper v. Stephens*, 4 Adolph. & Ell. 71.

³ Post. Rescinding of the Contract of Sale, Chap. xiv.

upon tendering the article sold.¹ If the purchaser do not, within a reasonable time after the sale, pay for and take away the goods, the vendor may resell them to another person.² So, also, if a particular time and place be appointed as the time and place of payment, and the purchaser or seller do not appear at such time and place, it is at the option of the party not in fault to abandon the contract, or to sue the other party for non-performance.³ So, also, in such a case, the seller might sell on behalf of the purchaser, and compel him to make up any deficit between the sum received and the price agreed;⁴ and if he be prejudiced by any unreasonable delay on the part of the buyer to fulfil his part of the engagement, he may recover damages therefor.⁵

§ 275. Where earnest is given, the old rule was, that the buyer might withdraw from the bargain, by forfeiting to the seller the whole money deposited. But if the seller failed to comply with the contract, the rule was, that he was bound to make a twofold restitution to the vendee, that is, to pay double the amount of the earnest money.⁶ This rule was, however, strictly confined to the advance of earnest money, and did not extend to cases of part payment. The same doc-

¹ *Langfort v. Tiler*, 1 Salk. R. 113; 6 Mod. R. 162; 2 Kent, Comm. Lect. 39, p. 495; *Goodall v. Skelton*, 2 H. Black. R. 316; *Roberts on the Stat. of Frauds*, 164 to 171; *Hinde v. Whitehouse*, 7 East, R. 571. But see *Greaves v. Ashlin*, 3 Camp. R. 426.

² *Ibid.*

³ *Neil v. Cheves*, 1 Bailey, South Car. R. 537; 2 Kent, Comm. Lect. 39, p. 495.

⁴ *Boulton v. Arnott*, 3 Tyrw. R. 267; S. C. 1 Crompt. & Mees. 333; *Langfort v. Tiler*, 1 Salk. R. 112; *McLean v. Dunn*, 4 Bing. 722; *Boorman v. Nash*, 9 Barn. & Cres. 145; *Gragory v. McDowell*, 8 Wend. R. 435; *Day v. Dox*, 9 Wend. C. 129. See Post, § 436.

⁵ *Greaves v. Ashlin*, 3 Camp. R. 426; *Marshall v. Campbell*, 1 Yeates, R. 36; *Brown on Sales*, No. 318. Post, § 436.

⁶ *Bracton*, L. 2, c. 27.

trine, also, obtains in the Roman Law, and in the Civil Law of France.¹

§ 276. We now come to the exception, first mentioned in the statute, — namely, “that the buyer shall except part of the goods so sold, and actually receive the same.”² The words “*accept* and *actually receive*,” in this sentence, are understood to mean a final and absolute appropriation by the purchaser, either of the whole article sold, or of a part thereof. So long as the contract of sale is, by its terms, subject to avoidance by either party; or, so long as either party has a claim upon the goods, as against the other; no sufficient acceptance has taken place, although the title be passed, or mere possession of the subject-matter of the sale be altered.³ If, therefore, by the terms of the sale, the purchaser may return the goods within a certain time, if they do not please him, the acceptance is not complete, so as to satisfy the requisitions of the statute, until such time has elapsed. So, also, so long as the purchaser is entitled to rescind the contract; or to object to the quality or quantity of the goods sent; or, so long as the seller retains any right of lien, or of stoppage *in transitu*, the acceptance is not sufficient.⁴ Thus, when a cargo of nuts was purchased, and

¹ Pothier de Vente, No. 498; Inst. L. 3 tit. 24; Dig. 48, l. 35.

² In the statute of frauds of New York, the exception “unless the buyer shall, at the time, pay some part of the purchase-money,” does not require that such payment should be made at the precise point of time when the parties make their original verbal agreement. See *Thompson v. Alger*, 12 Metcalf, R. 437.

³ *Russell v. Minor*, 22 Wend. R. 659; *Acebal v. Levy*, 10 Bing. R. 376; *Smith v. Surman*, 9 Barn. & Cres. 561; *Carter v. Touissant*, 5 Barn. & Ald. 858; *Rathbun v. Rathbun*, 6 Barb. Sup. Ct. R. 98.

⁴ *Ibid.*; *Astley v. Emery*, 1 Maule & Selw. 264; *Howe v. Palmer*, 3 Barn. & Ald. 321; *Phillips v. Bistolli*, 2 Barn. & Cres. 513; *Kent v. Huskisson*, 3 Bos. & Pull. 233; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *S. C.* 1 Dowl. & Ryl. 128; *Nicholle v. Plume*, 1 Car. & Payne, 272; *Balday v. Parker*, 2 Barn. & Cres. 44.

delivered on board a ship chartered by the purchaser, who, after the arrival of the nuts, when the bill of lading and invoice were sent to him, refused to accept the nuts or a bill of exchange drawn on him for the price; it was held, that the mere delivery on board the ship, did not constitute a delivery and acceptance within the meaning of the statute, and that, as there was no memorandum of the terms of sale, the purchaser was not liable for the price.¹ Again, if the agreement be, that the title to the subject-matter of sale shall remain in the vendor, until a certain date, when payment shall be made, it would not be binding, if made verbally.² Thus, where A agreed to purchase a horse from B for ready money, and to take him within a time agreed upon, and, about the expiration of such time, A rode the horse and gave directions as to its treatment, but requested that it might remain in the possession of B for a further time, at the expiration of which he promised to remove it and pay the price,

¹ *Acebal v. Levy*, 10 Bing. R. 384. In this case Ch. Justice Tindal, in delivering the opinion, said: "In the course of the argument on the part of the plaintiff, another point was adverted to, although not much relied on, viz., that there had been such an acceptance of these nuts by the defendants, as to take the case out of the statute of frauds. But the criterion to be found in many of the cases as to acceptance or non-acceptance of goods sold is this, — have the circumstances been such that the defendant has precluded himself from taking any objection to the quality of the goods sold? Here it would be impossible to contend, that, merely in consequence of the packages being received on board the ship chartered by the defendants, they had obliged themselves to take them, if, on their arrival, they had appeared altogether unmerchantable. We think, therefore, the nuts in question cannot be considered as having been accepted by the defendants; a question, indeed, which seems scarcely to arise upon a count, where the breach is assigned for non-acceptance of the goods sold."

² *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Thompson v. Maceróni*, 3 Barn. & Cres. 1; *Reed v. Upton*, 10 Pick. R. 522; *Blenkinsop v. Clayton*, 7 Taunt. R. 597; S. C. 1 B. Moore, R. 328; *Egerton v. Matthews*, 6 East, R. 308, and Mr. Day's note; *Vincent v. Germond*, 11 Johns. R. 283; *Gambling v. Read*, 1 Meigs, R. 281; *Houston v. Dyche*, 1 Meigs, R. 76; *Tibbetts v. Towle*, 3 Fairf. R. 341.

to which B assented, and the horse died before B took him away ; it was held, that there was no acceptance within the meaning of the statute.¹ So, also, where a sale of goods is made on an agreement that the price shall be applied to the payment of a precedent debt, such price must be actually applied by receipt or otherwise, in order to bring it within the exception in the statute.² The acceptance must be final, complete, and irrevocable ; and the subject-matter must have come into the absolute possession of the purchaser, or of some person authorized finally to receive it for him. An acceptance of goods, therefore, by a carrier or middleman, to take to the purchaser, is not sufficient, unless such carrier or middleman be the authorized general agent of the purchaser ; because such a delivery and acceptance would not be final, so as to deprive the seller of his right of stoppage *in transitu*.³ It is not, however, necessary, that there should be a mutual and actual reception of the goods ; for, if a complete constructive possession be given by symbol, so as finally to bind both parties ; or if a final appropriation by the purchaser be necessarily implied from his acts, so as to destroy all right to avoid the sale, or to object to it ;⁴ or if they be delivered to an agent or bailee authorized finally to accept them ; the acceptance will be sufficient.⁵ The only question is, whether the contract is completely executed on the part of the vendor, and assented to finally by the vendee, so that the right of property, and the possession, are irrevocably changed. Thus, if the vendor give to the vendee an order on a wharfinger or warehouseman, having the custody of the subject-matter of

¹ *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680.

² *Clark v. Tucker*, 2 Sandf. Sup. Ct. R. 157.

³ *Astley v. Emery*, 4 Maule & Selw. 264 ; *Hanson v. Armitage*, 5 Barn. & Ald. 557 ; *Howe v. Palmer*, 3 Barn. & Ald. 321 ; *Farina v. Howe*, 16 Mees. & Welsb. 119.

⁴ *Vincent v. Germond*, 11 Johns. R. 283.

⁵ See Post, § 278, *a*.

sale, to deliver it to the vendee, and the wharfinger or warehouseman accept the order, and agree to hold the goods on account of the vendee, the possession is thereby absolutely changed, so as to satisfy the statute;¹ although no transfer be made on the books.² But if the wharfinger or warehouseman refuse to accept the order, or to recognize the vendee as the owner, the delivery would not be sufficient.³ So, also, the delivery of the bill of lading, or dock-warrant, or of any other type and symbol of ownership, is considered to be sufficient, upon the ground, that the possession is thereby as absolutely changed, as if the article, of which it is a symbol, be given.⁴ Again, if a final and unequivocal appropriation of the article be implied from the acts of the parties, the statute is sufficiently complied with.⁵ Thus, where the plaintiff, who kept a livery stable, being in treaty with the defendant for the sale of two horses, asked one hundred and eighty guineas for them, which the defendant refused to give, but, subsequently, having altered his determination, he wrote to the plaintiff, that "the horses were his, but as he had neither servant nor stable, he, (the plaintiff,) must keep them at livery for him," and, thereupon, the plaintiff removed them out of his sale stable into another stable; it was held, that this was a sufficient delivery under the statute.⁶ So, also, where the plaintiff sold four oxen, which were feeding in his clover field, and the defendant said that he

¹ *Hollingsworth v. Napier*, 3 Caines, R. 185; *Wilkes v. Ferris*, 5 Johns. R. 335; *Searle v. Keeves*, 2 Esp. R. 598; *Lucas v. Dorrien*, 7 Taunt. R. 278; *Bentall v. Burn*, 3 Barn. & Cres. 423; *Tuxworth v. Moore*, 9 Pick. R. 349.

² *Harman v. Anderson*, 2 Camp. R. 245.

³ *Bentall v. Burn*, 3 Barn. & Cres. 423.

⁴ *Chaplin v. Rogers*, 1 East, R. 193; *Jewett v. Warren*, 12 Mass. R. 300; *Brinley v. Spring*, 7 Greenl. R. 241; *Gardiner v. Howland*, 2 Pick. R. 602; *Tucker v. Buffington*, 15 Mass. R. 477; *Manton v. Moore*, 7 T. R. 67; *Hurry v. Mangles*, 1 Camp. R. 452.

⁵ *Elmore v. Stone*, 1 Taunt. R. 458; *Chaplin v. Rogers*, 1 East, R. 192.

⁶ *Elmore v. Stone*, 1 Taunt. R. 458.

would take them at his own risk, but that they must remain there until he had completed his drove, and a short time afterwards he came and took three of them, it was held to be sufficient delivery under the statute.¹ So, also, where, of a sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold a part of it to another person, by whom it was taken away, without the vendor's knowledge, was held to be sufficient to take the case out of the statute; on the ground, that the exercise of such a right of ownership over the subject-matter, was consistent only with the idea of a final and irrevocable acceptance.² But in order to constitute a delivery and acceptance under the statute, there must be to the contract some act of the parties, amounting to a transfer of possession; the mere words of the contract are not sufficient.³

§ 277. So, also, if goods be delivered into the hands of some third person, as bailee of the purchaser, it will, ordinarily, be a sufficient delivery under the statute, because thereby the parties renounce all claim to withhold the goods on the one hand, and to reject them on the other. Thus, where wool was bargained for, and it was agreed that the buyer should remove it to the warehouse of a third person, in which he was accustomed to store his goods thus bought, and that it should be weighed and packed and remain there until paid for, and the wool was accordingly removed, weighed, and packed, it was held, that the acceptance was sufficient within the statute, since the vendee had no lien, and the goods were in the vendee's possession, the warehouse being constructively his warehouse.⁴ The mere payment of warehouse rent is not, however, alone, sufficient proof of such an acceptance, as that required by the

¹ *Vincent v. Germond*, 11 Johns. R. 283.

² *Chaplin v. Rogers*, 1 East, R. 193.

³ *Shendler v. Houston*, 1 Comstock, R. 261.

⁴ *Dodsley v. Varley*, 12 Adolph. & Ell. 634.

statute.¹ So, also, for the same reason, it was held, that where, in a sale of cattle, they were to remain in the vendor's possession, at the vendee's risk, until he called for them; and the vendee afterwards came and took them away, without saying any thing to the vendor, the delivery was sufficient.²

§ 278. But the acts of the parties must be, in such a case, wholly unequivocal; and, if the vendor retain possession of the subject-matter of sale, it must be under circumstances which expressly show that he holds them as agent of the other party, and has abandoned all claim to them of every kind.³ Thus where a horse was sold by verbal contract, and no time was fixed for the payment of the price, the agreement being, that he should remain in the possession of the vendor for twenty days, without charge to the vendee, and at the expiration of that time, the horse was sent to grass as one of the vendor's horses; it was held, that there was no sufficient acceptance; upon the ground that the plaintiff's character, as owner, remained unchanged from first to last, and that he could not have been compelled to deliver the horse, without a payment of the price.⁴ So, also, where A agreed to purchase a horse of B, and to take him away within a certain time, and at the expiration of the time, he rode the horse and gave directions as to its treatment, but returned it into B's possession to keep for a further time, after which he said, that he should take it away; it was held, that there was no sufficient acceptance within the statute.⁵ Indeed, in all these cases, the Court will construe the statute strictly; and in those cases only will a constructive delivery be considered as sufficient,

¹ *New v. Swain*, Dan. & Lloyd, 193.

² *Vincent v. Germond*, 11 Johns. R. 283.

³ *Bentall v. Burn*, 3 Barn. & Cres. 423; *Bailey v. Ogden*, 3 Johns. R. 399; *Jackson v. Watts*, 1 McCord, R. 288.

⁴ *Carter v. Touissant*, 5 Barn. & Ald. 855.

⁵ *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680.

where either actual delivery is symbolically given, or, where the circumstances so unequivocally indicate an intent to make a final delivery on the one side, and an ultimate acceptance on the other, as to be inconsistent with any other interpretation.¹ Whether there be a delivery, or acceptance, in point of fact, is a question of fact for a jury to determine; but, whether such delivery or acceptance be legally sufficient to satisfy the requisitions of the statute, is a question of law for the Court.² If the facts be uncontroverted, their sufficiency to constitute the acceptance required by the statute, is for the Court to determine. If the circumstances be doubtful, and the facts be controverted, it is for a jury to determine, under direction of the Court, as to the kind of delivery required by the statute, whether the actual delivery was of the kind required. The jury may extract the intent of the party from controverted facts and doubtful circumstances. The Court may determine the legal sufficiency of established facts.

§ 273 *a*. Where goods answering a particular description or bought under a warranty come to the actual possession of the vendee, he must be allowed a reasonable time to examine them, and to accept or reject them. A mere detention (unless grossly unreasonable,) or even an alteration of the articles by the vendee, does not necessarily constitute an acceptance under the statute. Whether, under the circumstances, the acts of the

¹ *Howe v. Palmer*, 3 Barn. & Ald. 324; *Proctor v. Jones*, 2 Car. & Payne, 534; *Smith v. Surman*, 9 Barn. & Cres. 570; *Dole v. Stimpson*, 21 Pick. R. 384.

² *Phillips v. Bistolli*, 2 Barn. & Cres. 511; *Chaplin v. Rogers*, 1 East, R. 192; *Maberley v. Shepherd*, 10 Bing. R. 99; *Hinde v. Whitehouse*, 7 East, R. 558; 2 Stark. Evid. Part IV., p. 611. This is the only doctrine, which we can extract from the cases, which seems to place upon any principle the distinction between questions for the Court and questions for the Jury, in respect to delivery. See also, *Farina v. Home*, 16 Mees. & Welsb. 119, 123; *Curtis v. Pugh*, 10 Adolph. & Ell. (N. S.) 111.

vendee constitute an acceptance is a question for a jury to decide. Thus, where A ordered three hogsheads of Scotch glue of the description called, "Cox's best," after it was sent to his warehouse, he removed it from hogsheads into bags. It was held that this did not necessarily constitute an acceptance of the glue.¹

§ 278 *b*. In all cases where the goods have not come into the actual and personal possession of the vendee, but are held by some third person, it must clearly appear, that such bailee holds them solely and finally for the vendee. And that the vendee accepts the goods as owner. The fact that a wharfinger or warehouseman delivers a warrant to the vendee by which the goods are rendered deliverable to the latter or his assignee by indorsement, upon the payment of rent and charges, and that the vendee accepts it, is not conclusive; such a warrant being considered as nothing more than an offer to hold the goods as warehouseman of the assignee, or to deliver them to the vendee. So long as the goods are not actually delivered, or the covenant assigned by indorsement, so that the goods are held for a subsequent purchaser, the wharfinger or warehouseman holds them as the agent of the assignor. *A fortiori*, the transit would not in such a case be ended, if the vendee on accepting the warrant should intimate that he did not accept the goods finally as owner, and that there was a question as to the sale. Thus, where goods shipped from abroad were sent to a shipping agent of the plaintiff's in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival; and the wharfinger delivered to the shipping agent a delivery-warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent and charges, and the agent indorsed and delivered this warrant to the defendant, who kept it for several

¹ *Curtis v. Pugh*, 10 Adolph. & Ell. (N. S.) 87.

months, and, notwithstanding repeated applications, did not pay the price of the charges upon the goods, but said that he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods; and that they would remain for the present in bond. Held, that there was no such delivery and acceptance as to take the case out of the statute of frauds.¹

§ 279. The distinction between that species of delivery, which would be sufficient to transfer the property in the article sold, were the contract in writing, or were the price paid on the spot, and that species of delivery, which if required by the statute, must never be overlooked. A delivery, which would be sufficient to pass the title, so that, in case the property should be destroyed, the loss would fall upon the vendee, would not, in all cases, be a sufficient delivery to satisfy the requisitions of the statute; since it might not destroy the vendor's right of lien or of stoppage *in transitu*, on the one

¹ *Farina v. Home*, 16 Mees. & Welsb. 119. In this case Baron Parke said, "on a motion for a new trial, we intimated our opinion that there was evidence to go to the jury of the defendant's acceptance of the goods by retaining the delivery-warrant; but Mr. Prentice insisted that there was no sufficient evidence of the actual receipt of the goods, that is, the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the delivery and receipt of the warrant was not in effect the same thing as the delivery and receipt of the goods; and we are all of that opinion. This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (who is the vendor's agent,) and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the meantime, the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee." See also *Bentall v. Burn*, 3 Barn. & Cres. 422.

hand, nor the vendee's right to reject the articles on the score of deficiency in quantity or quality, on the other hand.¹ Thus, although the mere marking and setting aside of goods sold, with the view of appropriating them to the vendee, and in compliance with his request, would pass the title to him; yet, inasmuch as such an act does not deprive the vendor of his lien upon the goods for their price, or his right of stoppage *in transitu*, nor prevent the vendee from rejecting the goods, in case they do not comply with either the express or the implied warranty, on which they were sold,—the delivery would not be sufficient under the statute, if the contract were by parol.² So, also, for the same reason, the mere marking and setting aside of the goods, would not be sufficient, although a day were fixed for payment; since such a modification of the contract would, in no wise, operate to deprive either party of their right to withhold the goods, on the one hand, or to return them, on the other.³

§ 280. In respect to an acceptance of a part of the goods sold, the same rule applies in respect to the part accepted; there must be a final acceptance and appropriation thereof.⁴ If a sample be delivered to the purchaser, it will be sufficient to satisfy the statute; provided, that it is considered by both parties as part of the commodity bargained for, and diminishes

¹ *Miles v. Gorton*, 2 Crompt. & Mees. 504; S. C. 2 Tyrw. R. 295; *Townley v. Crump*, 5 Nev. & Man. 608; *Bloxam v. Sanders*, 4 Barn. & Cres. 941; *Winks v. Hassall*, 9 Barn. & Cres. 375; *Rohde v. Thwaites*, 6 Barn. & Cres. 388; *Tarling v. Baxter*, 6 Barn. & Cres. 360; *Baldey v. Parker*, 2 Barn. & Cres. 44.

² *Kent v. Huskisson*, 3 Bos. & Pull. 233; *Astley v. Emery*, 4 Maule & Selw. 262; *Anderson v. Hodgson*, 5 Price, R. 630; 2 Stark. Evid. 611; *Howe v. Palmer*, 3 Barn. & Ald. 321.

³ *Ibid.*; *Carter v. Touissant*, 5 Barn. & Ald. 858; *Howe v. Palmer*, 3 Barn. & Ald. 321; *Proctor v. Jones*, 2 Car. & Payne, 532.

⁴ *Descard v. Bond*, cor. Ld. Hardwicke, cited 2 Stark. Evid. Part IV., p. 610.

the bulk thereof to be finally delivered.¹ But if it be considered only as a specimen, forming no portion of the commodity, the delivery and acceptance will not be sufficient.² Thus, where four hundred sacks of trefoil were bargained for, and set apart for the purchaser, who, some months afterwards, came into the warehouse, and asked for his seed, and then took samples from it, and carried them away, and subsequently refused to take the trefoil; it was held, that he took the samples as a part of the bulk, and not as an ordinary sample to guide his judgment previous to a purchase, and, therefore, that the statute did not apply.³

¹ *Hinde v. Whitehouse*, 7 East, R. 558; *Klinitz v. Surrey*, 5 Esp. R. 267; *Talver v. West*, Holt, R. 178.

² *Cooper v. Elston*, 7 T. R. 14; 1 Bell, Comm. 182; 2 Kent, Comm. Lect. 39, p. 501. In *Klinitz v. Surrey*, 5 Esp. R. 267, where fifty quarters of wheat were sold by sample to the defendant, Lord Ellenborough said: "How far the delivery of the sample in this case is a part delivery to satisfy the statute of frauds, depends on the manner in which that sample was taken. If the fifty quarters were standing as a distinct parcel and bulk, and the sample taken from it, if the quantity was thereby diminished so much, and the delivery of the fifty quarters was so much less by this quantity, I think it would be a part delivery, and sufficient within the statute; but it would be otherwise, if the delivery of the sample was a collateral thing, a part of another parcel of the same sort of corn." In *Talver v. West*, Holt, N. P. R. 178, Ch. Justice Gibbs affirmed the same doctrine.

³ *Talver v. West*, Holt, N. P. R. 178.

CHAPTER IX.

OF THE LIEN OF THE SELLER.

§ 281. THE next question which presents itself for our consideration is in respect to the seller's right of lien. This is an intermediate right of the seller, between the conclusion of the bargain and the delivery of the subject-matter to retain the article sold, until the price and all the charges upon it are paid ; — during which time the contract is considered as ambulatory, vesting in the buyer a general property in the subject-matter of sale, but giving the seller a special right until a tender of payment is made.

§ 282. A lien is a right to detain property until some charge, which is due upon it, is paid. It is in the nature of a pledge or security, and may be either legal or equitable. It is not a right of property in the thing itself, but only a right to retain it as security for some charge already due.¹ The lien of the purchaser, for the price of goods sold, originated with the Roman Law,² and afterwards became incorporated into the Common Law. It is a right to retain goods sold until the whole price is paid. A partial payment, therefore, will not operate to destroy the lien of the vendor upon all the goods, but only to diminish it in value ; every single portion of the

¹ 1 Story, Eq. Jurisp. § 506 ; 2 Ibid. § 1215.

² Dig. Lib. 18, tit. 1, l. 19 ; 2 Story, Eq. Jurisp. § 1216.

property sold, being covered by a lien for the smallest fraction of the price.¹

§ 283. This lien is generally dependent upon the possession of the goods by the vendor.² So long as he retains possession, whether it be personal, or through an agent, he retains a right of lien; and, as soon as he utterly relinquishes his possession, he generally loses his lien.³ The first question which suggests itself, is, therefore, what constitutes such a possession as to entitle the vendor to his lien.

§ 284. It may, however, be here premised, that it is in respect of possession that the lien of the vendor differs from his right of stoppage *in transitu*; inasmuch as the loss of possession does not deprive him necessarily of his right of stoppage *in transitu*, although it generally annihilates his lien. These two rights must be strictly distinguished from each other; since the principles of law governing them are by no means coincident and coëxtensive. Possession is, then, the ordinary test of a right of lien.⁴ And, as we shall hereafter see, non-delivery is the criterion of a right of stoppage *in transitu*.⁵

§ 285. So, also, it will be well to bear in mind in this con-

¹ Hodgson v. Loy, 7 T. R. 445; Hinde v. Whitehouse, 7 East, R. 571; Hawes v. Weston, 2 Barn. & Cress. 542.

² Brown on Sales, § 548; Lickbarrow v. Mason, 2 T. R. 63; 2 H. Black. R. 357; Newsom v. Thornton, 6 East, R. 21; Cross on Lien, 322.

³ Ibid.; Heywood v. Waring, 4 Camp. R. 291; New v. Swain, 1 Dan. & Lloyd, Merc. Cas. 193; Dixon v. Yates, 2 Nev. & Man. 177; Sweet v. Pym, 1 East, R. 4; Miles v. Gorton, 2 Crompt. & Mees. 504; Brown on Sales, § 638; Eland v. Carr, 1 East, R. 375; Mayer v. Nyas, 1 Bing. R. 311; Fair v. McIver, 16 East, R. 130; Hollis v. Claridge, 4 Taunt. R. 807; Chase v. Westmore, 5 Maule & Selw. 180; 2 Story, Eq. Jurisp. § 1216.

⁴ Cross on Lien, 6; Bloxam v. Sanders, 4 Barn. & Cres. 948; S. C. 7 Dowl. & Ryl. 396.

⁵ See Post, § 318; Brown on Sales, § 641, 642.

nection, that a lien is a right to retain property only in security of some charge already due thereupon, and that the vendor of goods has no lien after his payment is made or tendered to him. So, also, if he remit for a time his claim to payment, either by accepting a bill of exchange, or promissory note in payment; or by allowing a certain term of credit; or, if, by the contract, the vendee be entitled to take the goods immediately, there being no agreement as to when the price shall be paid, his right of lien will be suspended, until the maturity of the bill or note, or the expiration of the credit; upon the ground that, until then, nothing is due.¹ If, however, the goods remain in his possession until the maturity of the note, or the expiration of the term of credit, and the vendee refuse to pay, or the note be dishonored, the lien of the vendor revives.² He cannot have a present lien for a future debt; he can have no lien without a debt; and the only debt for which he can have a lien, is one which is due immediately, and not prospectively. If this rule be heeded carefully, some embarrassment may be avoided, in respect to what constitutes such a delivery as to pass the property after payment, and what is such a delivery as to deprive the vendor of that possession which entitles him to a lien. After payment, certain acts, (as we shall hereafter see,) may constitute a complete delivery, so as to pass the title, which will not destroy the lien of the vendor.

§ 286. The lien of the vendor always exists, until he volun-

¹ *Crawshay v. Homfray*, 4 Barn. & Ald. 50; *Hammond v. Anderson*, 1 Bos. & Pull. New R. 69; *Bunney v. Poyntz*, 4 Barn. & Adolph. 568; S. C. 1 Nev. & Man. 229; *Houlditch v. Desanges*, 2 Stark. R. 337; *Edwards v. Brewer*, 2 Mees. & Welsb. 375; *Feise v. Wray*, 3 East, R. 102. But accepting a bill of exchange or a promissory note, does not amount to a relinquishment of the equitable lien by the vendor of land. *Ex parte Peake*, 1 Madd. R. 346; *Ex parte Loaring*, 2 Rose. R. 79.

² *New v. Swain*, 1 Dan. & Lloyd, Merc. Cas. 193; *Miles v. Gorton*, 2 Crompt. & Mees. 512.

tarily and utterly resigns the possession of the goods sold, and all right to detain them; or until the buyer, by a compliance with the terms of the contract on his part, has acquired a right to take them.

§ 287. So long as the vendor retains goods, which he has sold, in his actual possession, or any third person holds them as his agent, and for his benefit solely, he retains his right of lien.¹ A mere marking and setting aside of particular goods will not, therefore, deprive him of his lien, so long as he holds the goods.² So, also, although the goods be paid for, yet, if they be kept by the vendor, to enable him to perform some act preliminary to a delivery, such as weighing or measuring, he still retains a lien.³ So, also, if he retain the goods, and store them in his warehouse for the benefit of the vendee, he will still be entitled to his lien thereon so long as the interests of third persons do not intervene. And, as between the vendor and vendee solely, this rule obtains, although rent be paid by the latter for the storage of the goods; for the mere charging and receiving of rent, is not considered as rendering the storehouse of the vendor constructively the storehouse of the vendee; nor as making the vendor the special bailee of the vendee; since the rent is charged, because the property is changed, and not because the possession, which is the foundation of lien, is changed.⁴ If,

¹ *Rhode v. Thwaites*, 6 Barn. & Cres. 333; *Townley v. Crump*, 5 Nev. & Man. 608; *Arnott v. Boulter*, 3 Tyrw. R. 267; *Dixon v. Yates*, 5 Barn. & Adolph. 313; *S. C.* 2 Nev. & Pay. 177; *Bates v. Conkling*, 10 Wend. R. 389; *Drinkwater v. Goodwin*, Cowp. R. 251; *Brown on Sales*, 458; *Whitaker on Lien*, 70.

² *Rhode v. Thwaites*, 6 Barn. & Cres. 388; *Dixon v. Yates*, 5 Barn. & Adolph. 313.

³ *Hanson v. Meyer*, 6 East, R. 614; *Whitehouse v. Frost*, 12 East, R. 614.

⁴ *Miles v. Gorton*, 2 Crompt. & Mees. 513; *Townley v. Crump*, 4 Adolph. & Ell. 58; *Greaves v. Hepke*, 2 Barn. & Ald. 131; *Elmore v. Stone*, 1 Taunt. R. 458; *Green v. Haythorne*, 1 Stark. R. 417.

however, the rights of third persons intervene, — as, if the vendee sell the goods again, or assign them to his creditors, — the right of the vendor to retain them is thereby defeated.¹ So, also, if, by the terms of the contract, the vendor take upon himself the character of bailee, and agree to hold them in such character, and not as vendor, his lien would be destroyed. Thus, if a vendor should deliver to the vendee a bill of parcels of the goods sold, with a receipt in full, and also a certificate, that he held them for the vendee, on storage, he would have no lien.²

§ 288. But if the vendor surrender to the vendee, or his agent, the possession of the subject-matter of sale, his lien is thereby defeated. Nor is it necessary, that such a surrender of possession should be manual and actual, where the circumstances of the case render it difficult or impossible; since a symbolical delivery will be sufficient, if it be made with the intention of completely transferring the property to the vendee,³ provided the vendor do not still retain actual possession of it. Thus, if the key of a warehouse containing a quantity of grain and cotton be delivered to the vendee, for the purpose of transferring to him the absolute possession thereof, the vendor will lose his lien. So, also, the rule applies to all cases where actual possession can only be given symbolically; the delivery of the grand bill of sale will convey the absolute possession of a ship at sea, and an assignment of a bill of lading will transfer the absolute possession of goods at sea.

§ 289. Where the goods, which are the subject of sale, are

¹ *Hurry v. Mangles*, 1 Camp. R. 452; *Chapman v. Searle*, 3 Pick. R. 44; *Barrett v. Goddard*, 3 Mason, R. 107.

² *Chapman v. Rogers*, 1 East, R. 194; Cross on Lien, 327; *Rice v. Austin*, 17 Mass. R. 204; *Jewett v. Warren*, 12 Mass. R. 300; Story on Contracts, § 513; *Frazer v. Hilliard*, 2 Strobhart, R. 309.

³ *Atkinson v. Maling*, 2 T. R. 465; *Gordon v. Cameron*, 7 T. R. 228.

in the hands of a third person, a question arises as to when, and under what circumstances, that person is to be considered the agent of the vendor, and when as agent of the vendee. We have already seen, that, if the goods be in the storehouse of the vendor, the mere payment of rent by the vendee, will not make the vendor his agent, nor make the warehouse of the vendor his warehouse, so as to destroy the lien of the vendor.¹ Although, if the vendee resell to a third person, from whom the rent is received by the original vendor, the lien of such vendor is defeated thereby; upon the ground, that he becomes the agent of the sub-vendee.² But, if the goods be in the warehouse of a third person, the reception of rent therefor from the vendee, would operate to destroy the lien of the vendor, if the latter had an absolute right to take the goods, without previous payment of the price; for the mere existence of a lien on the part of the warehouseman for rent would be wholly independent of the lien of the vendor for the price.³ But, if the sale be conditional, and the vendee have no right to take the goods, without complying with such condition, the mere fact that he pays rent for their storage to the warehouseman would not defeat the vendor's lien, since he may fairly be charged with rent, because of his property in the goods, and not because of his right of possession.⁴ Again, where the goods are in the warehouse of the vendor, the mere giving of a delivery order will not destroy his lien, so long as he actually holds the goods, although

¹ Ante, § 279; *Townley v. Crump*, 4 Adolph. & Ell. 58; *Miles v. Gorton*, 2 Crompt. & Mees. 501; 4 Tyrw. R. 295; *Bloxam v. Sanders*, 4 Barn. & Cres. 911.

² *Hurry v. Mangles*, 1 Camp. R. 452; *Miles v. Gorton*, 2 Crompt. & Mees. 513.

³ *Harman v. Anderson*, 2 Camp. R. 213; *Miles v. Gorton*, Crompt. & Mees. 510.

⁴ *Winks v. Hassall*, 9 Barn. & Cres. 372; *Dodson v. Varley*, 12 Adolph. & Ell. 632; *Bloxam v. Sanders*, 4 Barn. & Cres. 911.

he charge rent to the vendee.¹ But, where the goods are in the warehouse of a third person, an absolute delivery order given to the vendee would be sufficient to divest the possession from the vendor, after such third person accepts it and acknowledges the title of the vendee; upon the ground that he thereby renders himself the bailee of the vendee.² Yet, if he should refuse to accept the order, or to hold the goods as agent of the vendee, it would not, in itself, be a sufficient delivery of possession to destroy the vendor's lien. So, also, if the delivery order be conditional,—until the performance of the condition, the acceptance of it by the warehouseman would not be sufficient.³

§ 290. But so long as the vendor does not surrender actual possession, his lien exists, although he may have performed acts which amount to a constructive delivery, so as to pass the title, or to avoid the statute.⁴ For a lien does not import a right of property in the goods sold, but only a right of possession and detainer; and, therefore, a delivery, which will pass the title, will not necessarily destroy the lien. In no case where the vendor retains actual possession is his lien defeated. If, therefore, he deliver a portion of goods sold under an entire contract, the title to the whole will be thereby transferred to the vendee, unless it be intended by the parties to separate that portion which

¹ *Townley v. Crump*, 4 Adolph. & Ell. 58; *Dixon v. Yates*, 5 Barn. & Adolph. 313; *Hawes v. Watson*, 2 Barn. & Cres. 542.

² *Harmon v. Anderson*, 2 Camp. R. 243; *Miles v. Gorton*, 2 Crompt. & Mees. 509, 510; *Dixon v. Yates*, 5 Barn. & Adolph. 313; *Stonard v. Dunkin*, 2 Camp. R. 244; *Hollingsworth v. Napier*, 3 Caines' Cas. 185; *Wilkes v. Ferris*, 5 Johns. R. 335; *Lucas v. Dorrien*, 7 Taunt. R. 278.

³ *Dodsley v. Varley*, 12 Adolph. & Ell. 632; *Winks v. Hassall*, 9 Barn. & Cres. 372.

⁴ *Proctor v. Jones*, 6 Car. & Payne, 532; *Bloxam v. Sanders*, 4 Barn. & Cres. 941; *Tarling v. Baxter*, 6 Barn. & Cres. 364; *Clarke v. Spence*, 4 Adolph. & Ell. 466.

is delivered, from the remainder.¹ But, under such a contract, a part delivery of goods will not prevent the vendor from retaining his lien upon the remainder, if it be in his actual possession.² If, however, it were in the warehouse of a third person, as of a wharfinger, and, in compliance with a general order from the vendor, he should deliver a part, with no intention of distinguishing between it and the remainder, the seller's lien would be gone.³ Yet, even where the goods are in the warehouse of a third person, a partial delivery of the goods will not operate as a constructive delivery of the whole, so as to defeat the seller's lien in cases where there is an intention manifested by the seller to separate that which is delivered from that which remains; as, by the giving of a conditional order, or by instructions to the warehouseman to deliver only a part, until

¹ *Bunney v. Poyntz*, 4 Barn. & Adolph. 568; *Hammond v. Anderson*, 1 New, R. 69; *Dixon v. Yates*, 5 Barn. & Adolph. 339.

² *Miles v. Gorton*, 2 Crompt. & Mees. 504; *Payne v. Shadbolt*, 1 Camp. R. 427; *Bloxam v. Sanders*, 4 Barn. & Cres. 941; *Holderness v. Shackels*, 8 Barn. & Cres. 612; 4 Eng. Law Mag. Art. Mercantile Law, p. 369. In *Hammond v. Anderson*, 1 New, R. 69, where a number of bales of bacon were sold for an entire sum, by a bill of two months, and an order was given to the wharfinger to deliver them to the vendor, and the vendor then went and weighed the whole, and took a part; and it was held, that the taking of a part was a constructive taking of the whole. This is undoubtedly a correct decision, because, in the first place, the acceptance of the order by the wharfinger, rendered him the agent of the vendor, and the possession was totally changed; and besides, this was not a question of lien, because the vendor, by taking a bill at two months, temporarily abandoned all lien. So, also, in *Bunney v. Poyntz*, 4 Barn. & Adolph. 561, a note was given for the price. These cases must be distinguished from cases where the vendor does not suspend his lien by giving credit, or by taking a note; for while a lien is suspended, a part delivery might operate as a delivery of the whole, so as to pass the title, and thereby to give the vendee a right to take the goods, payment not being a condition precedent. In such cases, the form of the contract, or the intention of the parties, would determine whether a part delivery were a delivery of the whole, or not.

³ *Hammond v. Anderson*, 1 Bos. & Pull. N. R. 69; *Dixon v. Yates*, 5 Barn. & Adolph. 339.

payment.¹ In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the vendee, it is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such a delivery is considered as sufficient to annul the lien of the vendor.² In all cases where the act is equivocal, and not indicative of a clear intention to surrender the whole control of the subject-matter, the lien remains.

§ 291. Again, the lien of the seller is not dependent solely, and under all circumstances, upon personal and actual possession. For if, although he have not the goods sold in his actual possession, he, nevertheless, retain some right or special claim to detain them, — as, if they be in the hands of a third person, and, by the terms of the contract of sale, the vendee is not to be entitled to take them, until he has complied with certain conditions, or performed certain acts, the lien of the vendor still remains.³ Nor does it matter, in such cases, that the third person is employed by the vendee to store the goods, so as to render his warehouse the constructive warehouse of the vendee; since the lien is not gone until the vendee acquires a right to take the goods. Thus, where A bought a quantity of wool of B, and removed it to a warehouse belonging to C, but which was hired by A, and, by the agreement, the wool was not to be removed by A, until the price was paid by him, it was held, that B still retained a lien upon the goods.⁴

¹ Ibid.; *Miles v. Gorton*, 2 Crompt. & Mees. 504; *Dodsley v. Varley*, 12 Adolph. & Ell. 632; *Winks v. Hassall*, 9 Barn. & Cres. 672,

² *Atkinson v. Maling*, 2 T. R. 465; *Rice v. Austin*, 17 Mass. R. 197; *Jewett v. Warren*, 12 Mass. R. 300.

³ *Dodsley v. Varley*, 12 Adolph. & Ell. 632; *Bloxam v. Sanders*, 4 Barn. & Cress. 948.

⁴ *Dodsley v. Varley*, 12 Adolph. & Ell. 632. Dord Denman, in this

§ 292. So, also, if possession be voluntarily surrendered for a limited space, and for a special purpose, with no intention on the part of the vendor to surrender his possession entirely, and forever, the lien is not destroyed, but only temporarily suspended.¹ Thus, if A purchase a horse of B, with the understanding that A shall not take the horse until he pays the price, and, before he pays the price, B allows him to take the horse for a day, or for two days, or a week, to drive, the lien of B is not determined but merely suspended during the time for which he allows A to use the horse. All this doctrine in respect to lien proceeds upon the ground that the vendor has a right to retain the goods until the price is paid; and unless it clearly appear that his intention is, by his acts, absolutely and finally to abandon that right, it still remains. Whatever conditional, or temporary arrangement he may make, as to storage or possession, so long as it is consistent with an intention to retain a special right to detain the goods, it will not be a forfeiture of his lien. But, whenever the terms of the contract of sale are inconsistent with the existence of a lien,—as where the agreement is, that the vendee shall have immediate possession; or, where a note is taken, or credit is given, the seller has no lien.²

§ 293. If the vendor be divested of the goods, sold by the

case, although he asserts the right of the vendor to retain the goods until payment, says that the plaintiff “had not what is commonly called a lien determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant.” It seems, however, to be a lien or nothing, that the vendee has, and the definition of the right of the vendee by his Lordship, is a complete definition of a lien. A lien is always a special interest, consistent with the property being in another person than him having the lien.

¹ *Reeves v. Capper*, 5 Bing. N. C. 136; S. C. 1 Arn. R. 427; *Bloxam v. Sanders*, 4 Barn. & Cress. 941.

² *Crawshay v. Homfray*, 4 Barn. & Ald. 50; *Cross on Lien*, 40; *Walker v. Birch*, 6 T. R. 258; *Hewison v. Guthrie*, 2 Bing. N. C. 755; S. C. 2 Hodg. R. 51.

wrongful or fraudulent act of the vendee, he may recover them by an action of *trover*. Thus, it has been held, that, if a vendee, having agreed to pay for goods on delivery, acquire possession by giving a check, which is afterwards dishonored, he gains no property in the goods if he had no reasonable ground to expect that it would be honored, upon the ground that such an act would be a direct fraud.¹

¹ *Hawse v. Crowe*, Russ. & Mylne, 414. See, also, *Abbotts v. Barry*, 2 Ball. & Beat. 369; *Noble v. Adams*, 7 Taunt. R. 59; *Stephenson v. Hart*, 4 Bing. R. 476; *Earl of Bristol v. Wilsmore*, 1 Barn. & Cress. 514; S. C. 2 Dowl. & Ryl. 755.

CHAPTER X.

OF DELIVERY.

§ 294. HAVING already considered what species of delivery and acceptance is necessary, in order to comply with the requisitions of the statute of frauds, in case the contract is not in writing ; and, also, what delivery is sufficient to transfer the possession of the subject-matter of sale, so as to destroy the lien of the vendor ; we now come to the consideration of what constitutes such a delivery as to transfer the title of the subject-matter of sale. And, before entering upon this subject, it may be as well briefly to enumerate, and mark out the different species of delivery which are required in different cases.

§ 295. There are four different species of delivery. *First*, that delivery which suffices to pass the title, so that, if the goods be destroyed, the loss falls upon the vendee ; which will form the subject of the present chapter. *Second*, that delivery which suffices to destroy the lien of the vendor, — which consists in a total and unqualified surrender of possession, and of special claim to retain the goods by the vendor. *Third*, that delivery which is necessary to satisfy the requisitions of the statute of frauds, in case the contract is not in writing, which requires not only an utter relinquishment of possession by the vendor, but also an absolute and final appropriation by the vendee, so as to destroy the right of either party to rescind the contract. These different species of delivery must be strictly distinguished from each other, or the cases will present nothing but embarrassment and confusion to the student. It must be

remembered, that a delivery may be sufficient to pass the title, which is not always sufficient to destroy a lien; and that a delivery, which will defeat the lien of the vendor, may not be sufficient to satisfy the requisitions of the statute of frauds.¹

§ 296. No sale is complete, so as to vest in the vendee an immediate right of property, so long as any thing remains to be done between the buyer and seller in relation to the goods.² The goods sold must be separated, and identified by marks or numbers, so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed.³ If they be sold by weight, or measure, or number, the specific quantity bought must be weighed, or measured, or counted, so as to be separate and distinct from all other similar goods. Thus, where the vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at a certain price per hundred weight, the starch being in papers, and the exact weight not being known, but to be afterwards ascertained; and fourteen days were allowed for the

¹ *Clarke v. Spence*, 4 Adolph. & Ell. 466; *Tarling v. Baxter*, 6 Barn. & Cress. 364.

² *Hanson v. Meyer*, 6 East, R. 614; *Austin v. Craven*, 4 Taunt. R. 644; *White v. Wilks*, 5 Taunt. R. 176; *Outwater v. Dodge*, 7 Cow. R. 85; *Busk v. Davis*, 2 Maule & Selw. 397; *Barrett v. Goddard*, 3 Mason, R. 107, 112; *Woods v. McGee*, 7 Ohio, R. 128; *Ellis v. Hunt*, 3 T. R. 464; *McDonald v. Hewett*, 15 Johns. R. 349; *Russell v. Nicholl*, 3 Wend. R. 112; *Outwater v. Dodge*, 7 Cow. R. 85; *Ward v. Shaw*, 7 Wend. R. 436; *Damon v. Osborne*, 1 Pick. R. 476; *Macomber v. Parker*, 13 Pick. R. 175; *Sumner v. Hawlet*, 12 Pick. R. 82; *Pothier, Contrat de Vente*, § 309; *Riddle v. Varnum*, 20 Pick. R. 280; *Houdlette v. Tallman*, 2 Shepley, R. 400; *Hale v. Huntley*, 21 Vermt. (6 Washburn) R. 147.

³ *Hutchinson v. Hunter*, 7 Barr, R. 140. In *Dennis v. Alexander*, 3 Barr, R. 50, the court say: "It is not the law, that the right of property in a chattel cannot pass by a sale, so long as the quantity of the thing sold remained to be ascertained. It is only when something is to be done for the ascertainment of the quantity *by the very terms of the contract*, that it is incomplete." See, also, *Scott v. Wells*, 6 Watts & Serg. 368.

delivery, and the vendor gave to the vendee a note addressed to the warehouse keeper, directing him to weigh and deliver to the vendee all the starch ; it was held, that the absolute property in the starch did not vest in the vendee before it was weighed.¹ So, also, where the following bought note was given. " Bought

¹ *Hanson v. Meyer*, 6 East, R. 614. In this case, Lord Ellenborough said, " If any thing remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer ; and, of course, this action, (trover,) which is accommodated to, and depends upon, such supposed perfect right of property, is not maintainable." But see *Crofoot v. Bennett*, 2 Comstock, R. 260, where a distinction is made between the purchase of a *whole* number or bulk, when the counting or weighing is only for the purpose of reckoning the price, and where a portion out of a number or bulk of articles is sold and the counting or weighing is for identification and specification. " It is a fundamental principle" says Strong, J., " pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified. (2 Kent's Com. 496.) These rules are fully supported by the authorities cited by the chancellor. The reason is, that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular brick belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that is specification, the property is not changed ; if it is merely to ascertain the total value at designated rates, the change of title is effected."

of Mr. S. Z. & Co., 239 bales of goat-skins from Mogadore, per Commerce, containing five dozen in each bale, at the rate of 57s. 6d. per dozen, to be taken as they now lie, with all faults, paid for by good bills at five months ;” and it appeared, that, by the usage of trade, it was the duty of the seller to count over the skins before delivery, for the purpose of ascertaining that each bale contained the specified number, which was not done in this case ; and the goods were consumed by fire upon the wharf where they were sold ; it was held, in an action brought against the buyers for not accepting bills according to the bargain, that there was no complete transfer of the property to the purchaser, because they had not been counted over, and that the seller was, therefore, to bear the loss.¹ So, also, where the seller owned the cargo of a certain ship, containing thirty tons of hemp, of which he sold ten tons to B, at £110 per ton, and gave the wharfinger an order to weigh and deliver it, and, before it was weighed, the purchaser stopped payment, it was held, that the property did not pass.²

§ 297. The duties of the seller in each particular case, depend upon the express and implied terms of the contract, which may be varied and extended by the usage of trade. As, for instance, in the illustration just cited, where the buyer was held to be responsible for the safety of the goods sold, until he had complied with the usage, by counting them.³ So, also, where a quantity of oil was sold, and it appeared, that it was the custom, before the delivery, for the cooper of the seller to search the cask, and for a broker in behalf of both parties to ascertain the foot-dirt and water in each, for which allowance was to be made, and the casks were then to be filled up by the seller’s

¹ *Zagury v. Furnell*, 2 Camp. R. 240.

² *Shepley v. Davis*, 5 Taunt. R. 617 ; *White v. Wilks*, 5 Taunt. R. 176.

³ *Ibid.*

cooper ; it was held, that, until such acts were done, the property did not completely pass to the vendee.¹

§ 297 *a*. There is, however, no implied contract upon the sale of personal property, that the vendee shall pay the vendor for any services in relation to the property, rendered previous to the completion of the sale by delivery — such services as are necessary or incidental to the delivery being rendered in the absence of any express stipulation, as a part of the original contract. Thus, where loose wool was sold, the quantity to be ascertained by weighing, and it was afterwards sacked in sacks furnished by the vendee ; it was held that there being no express contract as to payment for the sacking, the vendee was not bound to pay therefor.²

§ 298. But where every thing which is material has been done by the seller, and the goods have been identified by weighing, or measuring, or counting, the fact that some trifling and insignificant act has not been done, which might strictly be required, will not prevent the title from passing to the vendee. Thus, where a number of trees were sold at a certain sum per cubic foot, and each tree was measured and the number of cubic feet therein was ascertained ; it was held, that the property passed, although the aggregate number of feet had not been ascertained, by adding together the different measurements.³

§ 298 *a*. But, although ordinarily, so long as any thing remains to be done by the seller, the goods are at his risk ; yet this general rule may be overcome by the special facts of the case — and if it clearly appear to have been the intention of

¹ *Wallace v. Brees*, 13 East, R. 522.

² *Cole v. Kerr*, 20 Vermt. (5 Washburn) R. 21, Post, § 394.

³ *Tansley v. Turner*, 2 Bing. N. C. 151. See, also, *Crofoot v. Bennett*, 2 Comstock, R. 260.

the parties that the property should be deemed to be delivered, and the title to have been passed, and especially if their acts be inconsistent with any other view, the mere fact that something remains to be done, will not govern such intention. Thus, where on the sale of a parcel of barley in the vendor's storehouse, at so much per bushel, the quantity to be subsequently ascertained, the vendor agreed that it might be allowed to remain there until a future day named, when his right to the possession of the storehouse would pass to another person; and the vendee agreed with the party who was to succeed to the possession of the building for the storage of the grain after the day named, and after such change of possession the building with the grain was destroyed by fire; held, that there had been a delivery, that the title had passed, and that the loss fell on the vendee.¹

§ 299. Where the seller has performed every thing that is required of him as to a certain portion of the thing sold, but something still remains to be done as to the rest, the portion, in regard to which the seller has performed all his duty becomes the property of the vendee, but the portion in respect to which something is yet to be done, still belongs to the vendor, and is at his risk.² Nor does it make any difference as to this rule, whether the contract be an entirety or not.³ Thus, where twenty-four casks of turpentine were sold by auction, which were not completely full, but were to be filled by the seller, and he accordingly filled up all the casks but ten, and before he could fill the remainder, they were all consumed by fire; it was held, that the sale was complete as to all the casks which

¹ *Olyphant v. Baker*, 5 Denio, R. 379. See, also, *Crofoot v. Bennett*, 2 Comstock, R. 259.

² *Rugg v. Minett*, 11 East, R. 210; *Hanson v. Meyers*, 6 East, R. 614; *Simmons v. Swift*, 5 Barn. & Cres. 857.

³ *Ibid.*

had been filled, but that it was not complete as to the other ten, the loss of which was, therefore, to be borne by the vendor.¹ So, also, a stack of bark was sold at a certain price per ton, and a certain part was weighed and delivered; it was held, that the vendee acquired property only in that portion which was weighed.²

§ 300. Where the seller has performed all that is required of him by the terms of the contract, as to all of the goods, and delivery alone remains to be made, the property vests in him, so as to subject him to the risk of any accident which may befall the subject-matter of the sale.³ It is not necessary for the seller to deliver the goods to the buyer, in order to transfer the title; since the right of property does not depend upon the actual possession. Although, therefore, the seller has a right of lien upon them, and cannot be forced to surrender possession, until payment is made of the price, yet the goods may be, nevertheless, the property of the buyer.⁴

§ 300 *a*. But although after the vendor has performed all that is required of him, the title to the goods sold passes to the vendee, yet the goods may still be supposed to remain actually in his custody, and it becomes necessary, therefore, to consider what are his duties in respect to custody in such cases. The rule derived from the Roman law on this head, is that in

¹ *Rugg v. Minett*, 11 East, R. 210.

² *Simmons v. Swift*, 5 Barn. & Cres. 857.

³ *Hanson v. Meyer*, 6 East, R. 614; *Simmons v. Swift*, 5 Barn. & Cres. 857; *Bloxam v. Sanders*, 4 Barn. & Cres. 911; 2 Kent, Comm. Lect. 39, p. 492, 493; *Wallace v. Breeds*, 13 East, R. 522; *Bell on Sales*, 82; *Frazer v. Hilliard*, 2 Strobb. R. 309; *Olyphant v. Baker*, 5 Denio, R. 379; *Zinn v. Rowley*, 4 Barr, R. 169.

⁴ *Ibid.*; *Hinde v. Whitehouse*, 7 East, R. 571; Code Nap. 1583; *Tarling v. Baxter*, 6 Barn. & Cres. 360; 2 Kent, Comm. Lect. 39, p. 492; *Langfort v. Tyler*, 1 Salk. R. 113.

the absence of any express stipulation the vendor is bound to take such care of the goods, as a prudent father of a family would take, *si nihil appareat convenisse, talis custodia desideranda est a venditore, qualem bonus paterfamilias suis rebus adhibet*.¹ His duties as to custody, therefore, fall within the second class or degree of care established by the Roman law, and recognized by the common law, in respect to bailees. He is bound to that degree of care and attention which men of common prudence generally bestow on their own property, and it is no conclusive answer in a particular case, when goods are actually destroyed through the vendor's negligence, that he has taken the same care of them as of his own, if he did not take ordinary care of his own; although such a fact may well afford a strong presumption of proper care.

§ 300 *b*. This rule is, however, limited to cases where the buyer is under no obligation to remove the goods. For if a time be fixed for actual delivery, and it have elapsed, or if, no time having been fixed, the vendee receives notice to take away the goods, the obligation of the vendor is simply to observe good faith, and he is only responsible in cases of fraud, or of gross negligence, assimilated to fraud. Where the delay of delivery grows out of the original terms of the contract, whether express or implied, the vendor is bound to ordinary care and diligence; the custody of the goods being for the benefit of both parties, as in the case of pawn or hiring. But where the delay is occasioned by the vendee, the time of delivery having elapsed, or he having received notice to take the goods away, the vendee is only liable in like manner as a depositary

¹ Dig. de Periculo et Commodo Rei Venditæ, Lib. 18, tit. 1, art. 35. Ib. Lib. 18, tit. 6, art. 11. In respect to custody, the Roman jurists were not completely agreed. See Mackeldey Lehrbuch des Heutigen Römischen Rechts, § 370; Cæsar's Dig. Lib. xix. tit. 1, art. 13, § 16; Ib. art. 36; Paulus Dig. Lib. xviii. tit. 6, art. 3, art. 14, § 1. But see Justinian Instit. Lib. iii. tit. xxiii. art. 3; see Pothier de Vente, No. 53, 54, 55.

and mandatary, in case of fraud and gross negligence; the custody of the goods being solely for the advantage of the vendee.¹

§ 301. Where no agreement is made in respect to delivery, it is, ordinarily, the duty of the buyer to take the goods, — for the seller is considered as having performed all his duty, when he has done everything that is incumbent on him, to enable the buyer to take the goods.² If, therefore, after the seller has done all that is required for him to do, the buyer, through neglect, and carelessness, suffer the goods to remain in his hands, the seller is absolved from all liability for any consequences resulting therefrom. Thus, where A bought of B a quantity of hops then lying at the warehouse of F, where they had been stored by the seller, and B was informed, that the hops were at F's, and they were there weighed and notice was given that they were ready for delivery, and B actually removed a part, but the remainder were seized by a creditor of F's; it was held that B was not liable for the non-delivery of them.³ Again, if, by agreement between the parties, the sub-

¹ Ibid.; “Nunc videndum est, quid veniat in commodati actione, utrum dolus, an et culpa? an verò et omne periculum? Et quidem in contractibus interdum dolum solum, interdum et culpam præstamus. Dolum in deposito: nam quia nullam utilitas ejus versatur apud quem deponitur, meritò dolus præstatur solus: nisi fortè et merces accessit. Tunc enim (ut est et constitutum) etiam culpa exhibetur: aut si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponitur. Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate: et dolus et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus cui commodatur. Et ideò verior est Quinti Mucii sententia, existimantis, et culpam præstandam, et diligentiam.” See also Dig. Lib. xxi. tit. 1, art. 31, § 11, 12; Dig. Lib. xviii. tit. vi. art. 14, art. 17, art. 4, art. 11. See also Contract of Sale, 13 American Jurist, p. 254. See also, Pothier de Vente, No. 53, 54, 55.

² The same rule obtains in the Civil Law of France; Pothier, Contrat de Vente, No. 46, 51; and of Scotland, Bell on Sales, 82.

³ Wood v. Tassell, 6 Adolph. & Ell. 234.

ject-matter of sale is to remain in the hands of the vendor for storage, there will be a sufficient delivery to pass the title, as soon as the vendor has done all that is required by the contract or the usage. If, in such a case, the goods be paid for, the property would, *a fortiori*, be in the vendee. Thus, where A agreed to sell to B a certain quantity of beef, and, a short time afterwards, gave him a bill of parcels, and B paid the purchase-money in full, and it was agreed that the beef should remain in the custody of A until it should be sent to New York, and, seven months after, B received a part, which proved to be bad and unmerchantable, and he brought an action for the price; it was held, that, as the beef had been good at the time of the sale, the vendee could not recover,—for that the property had been sufficiently delivered to throw upon him the risk.¹

§ 302. But by the terms of the contract, it may be the duty of the seller to deliver the goods sold, and it therefore becomes necessary to consider what acts will constitute such a delivery as to pass the title. And, in this respect, the first remark to be made is, that unless a particular mode and form of delivery be necessitated by the terms of the contract, any delivery, which is sufficient to destroy the vendor's lien, or right of stoppage *in transitu*, or which is sufficient under the statute of frauds, will be sufficient to vest the property in the vendee.

§ 303. Before proceeding to consider this subject, it may be as well to premise, that the vendor is not bound to make any delivery of the goods to the vendee, until the price is tendered;² unless credit be given, which is a waiver of any right

¹ *Lansing v. Turner*, 2 Johns. R. 12.

² *Bloxam v. Sanders*, 4 Barn. & Cres. 948. In this case, Mr. Justice Bayley said: "Where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and

to require immediate payment; or, unless the seller admit that a tender is fruitless and unnecessary, — in both of which cases a tender of the price need not be made.¹ So, also, if the buyer be insolvent when he demands delivery, the seller may refuse to deliver.² But if no credit be given, the vendor is bound to deliver the goods immediately, upon the request of the buyer, with tender of payment.³

§ 303 *a*. Where a contract of sale is made, by which the price is to be paid by a promissory note, upon the making and tendering the note the purchaser is at once entitled to the property; and if the note be accepted the contract is executed. Thus, where a lot of pine timber was sold for \$800, F, the purchaser, agreeing to give his note therefor, indorsed by N, and the note was executed according to the agreement and

the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. The buyer's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated, if he becomes insolvent before he obtains possession." See also *Miles v. Gorton*, 2 *Crompt. & Mees.* 504; *Parker v. Rawlings*, 4 *Bing R.* 280; *Cowper v. Andrews*, *Hobart R.* 41; *Atkinson v. Barnes*, *Lofft R.* 325; *N. Y. Fireman's Co. v. De Wolf*, 2 *Cowen R.* 56; *Post*, § 403; *Conway v. Bush*, 4 *Barb. Sup. Ct. R.* 125; *McDonald v. Hewett*, 15 *Johns. R.* 349; *Coil v. Willis*, 18 *Ohio R.* 28.

¹ *Jackson v. Jacob*, 3 *Bing. N. C.* 869.

² *Reader v. Knatchball*, 5 *T. R.* 218, *n.*

³ 2 *Kent, Comm. Lect.* 39, p. 496; *Haswell v. Hunt*, cited 5 *T. R.* 231; *Harris v. Smith*, 3 *Serg. & Rawle*, 20; *Chapman v. Lathrop*, 6 *Cowen R.* 110.

accepted by the seller, it was held that a present interest to the timber passed at once to F.¹

§ 304. Delivery is either actual or constructive, or is absolute or conditional. An actual delivery is a manual transfer of the commodity sold to the vendee, and operates to transfer the title in all cases, unless it be made upon a condition, which prevents such a consequence. An actual delivery involves a consideration of the person to whom goods are to be delivered, and the place where, and the time when, they are to be delivered.

§ 305. And, in the first place, as to the person. It is not necessary, that the delivery should be to the buyer personally, so that the goods come to his "corporal touch;" but it will be sufficient, if they be delivered to any accredited agent, or servant of the vendee, or any third person designated by him as the person who would receive them.² The delivery to an agent or servant should, however, be so complete, as to create a liability on the part of the agent or servant to the vendee; and a delivery made without due care and diligence, and to an irresponsible or improper person, will not be sufficient.³ The delivery should be made, either according to the mode prescribed in the agreement; or, in the absence of any agreement, as to the person or mode in which they should be delivered, the seller should follow the most usual and con-

¹ *Warren v. Leland*, 2 Barb. Sup. Ct. R. 613.

² *Bull v. Sibbs*, 8 T. R. 328; *Blakey v. Dinsdale*, Cowp. R. 664; *Vale v. Bayle*, Cowp. R. 294; *Dutton v. Solomonson*, 3 Bos. & Pul. 582; *Copeland v. Lewis*, 2 Stark. R. 33; 1 Bell, Illust. p. 108; Bell on Sales, 85, 86; *Leeds v. Wright*, 3 Bos. & Pull. 320; *Dixon v. Baldwin*, 5 East, R. 175; *Anderson v. Hodgson*, 5 Price, R. 630; *King v. Meredith*, 2 Camp. R. 639; *Swain v. Shepherd*, 1 Mood. & R. 223; *Rohde v. Thwaites*, 6 Barn. & Cres. 688.

³ *Buckman v. Levi*, 3 Camp. R. 414; 2 Kent, Comm. Lect. 39, p. 499; Bell on Sale, 89.

venient practice, so as to give the buyer the benefit of every security, which he could reasonably expect.¹ He should, therefore, where they are consigned from a distance, employ proper diligence in informing the vendee of the consignment; and, if it be customary among merchants, for the seller to insure similar shipments, or if such have been the uniform course of dealing between the parties, he is bound to insure; but the proof of such custom is on the vendee.² Of course, if there be any specific agreement to insure, he must conform to it.

§ 306. So, also, a delivery to a common-carrier, will be a sufficient delivery to the vendee, although the right of stoppage *in transitu*, still remains in the vendor. Thus, a delivery by a consignor of goods, on board of a general ship, or of a ship chartered by the consignee, is a delivery to the consignee.³ Nor does it matter, so far as the title is concerned, which party pays freight for the goods, the carrier being always considered as the agent of the buyer.⁴ In case of loss or injury of the goods, while in the hands of the carrier, the buyer alone will be entitled to an action against him, unless the freight be paid by the seller, in which case the latter may bring an action for non-delivery.⁵ Of course, if the seller expressly assume the

¹ *Copeland v. Lewis*, 1 Stark. N. P. C. 33; *Harwood v. Lester*, 3 Bos. & Pull. 617; *Buckman v. Levi*, 3 Camp. R. 414; 2 Kent, Comm. Lect. 39, p. 499; *Cothay v. Tate*, 3 Camp. R. 129; *Clark v. Hutchins*, 4 East. R. 475; *Bell on Sales*, 89; *Huxham v. Smith*, 2 Camp. R. 21.

² *Ibid.*; *Story on Agency*, § 190; *Smith v. Lascelles*, 2 T. R. 189.

³ *Inglis v. Usherwood*, 1 East, R. 515; *Coxe v. Harden*, 4 East, R. 211; *Fowler v. M'Taggart*, 7 T. R. 442; *Botlingk v. Inglis*, 3 East, R. 395; *Brown v. Hodgson*, 2 Camp. R. 36; *Groning v. Mendham*, 5 Maule & Selw. 189; *Ullock v. Riddlelin*, Dan. & Loyd. Merc. Cas. 6.

⁴ *Dutton v. Solomonson*, 3 Bos. & Pull. 584; *Vale v. Bayle*, Cowp. R. 294; *King v. Meredith*, 2 Camp. R. 639; *Swain v. Shepherd*, 1 Mood. & Rob. 223; *Eng. Law Mag.* Vol. 4, p. 357.

⁵ *Davis v. James*, 5 Burr. R. 2680.

responsibility of carrying the goods, he must bear the loss, if they be destroyed or injured.¹

§ 307. Secondly, as to the place where goods must be delivered. By the Common Law, a distinction obtains, in regard to the delivery of portable goods, between a contract of sale and a contract to pay an existing debt in specific articles. In the latter class of cases, if a place be specially appointed, in which the delivery shall be made, or be implied from the usage of trade, or from the previous course of dealing between the parties, or from the nature of the commodity, delivery must be made accordingly.² But, if no place be either expressly or impliedly appointed, it is the duty of the debtor to request the creditor to appoint a reasonable place, and the debtor must, thereupon, appoint a proper place. If, however, he do not, the debtor may then designate some place which is reasonable, giving notice thereof to the creditor, and a tender at such place will be good.³ The place, however, must be reasonable and proper, and neither party can appoint a place so remote or inconvenient as to render the cost of transportation unreasonably great.⁴ If the debtor, upon making a tender at the time and place appointed, find no one ready to receive them; or, if the vendee or his agent refuse to receive them, he may mark them and set them aside, and this will be sufficient, in the

¹ Stephenson v. Hunt, 1 Moore & Payne, 357; S. C. 4 Bing. R. 476; Duff v. Budd, 3 Ball & Beat. 177; S. C. 6 Moore, R. 469.

² Bourne v. Gatcliffe, 7 Mann. & Grang. 850, 865.

³ Co. Lit. 210, b; Aldrich v. Albree, 1 Greenl. R. 120; Bixby v. Whitney, 5 Greenl. R. 192; Carrier v. Carrier, 2 N. Hamp. R. 75; Chipman's Essay on Law of Contracts, 25, 26; Goodwin v. Holbrook, 4 Wend. R. 380; Pothier Traité des Obligations, n. 512. In Vermont and New York, however, *portable* goods must be delivered at the domicile of the creditor; and the rule of the text only applies to *bulky* or *ponderous* goods. 2 Kent, Comm. Lect. 39, p. 507; Goodwin v. Holbrook, 4 Wend. R. 377.

⁴ 2 Kent, Comm. Lect. 39, p. 508.

absence of any express or implied contract to the contrary, to discharge the debt, and to pass the title to the creditor.¹ If, however, the debtor choose to retain the goods in his own possession, he holds them as bailee of the creditor, and at the risk and expense of the latter.² So, also, if the goods be of a perishable nature, the debtor may sell them on account of the creditor, and he will be only accountable for the net proceeds in respect to his debt.³ But, where a note is given, to be paid in specific articles, and no time and place of payment are appointed, the law implies that the note is payable on demand, and demand must, therefore, be made of the debtor at his domicil, or place of business.⁴ So, also, the same rule holds where an agreement is made to pay a debt in specific articles, when demanded.⁵

§ 308. In a contract of sale, if no place of delivery be agreed upon, the articles sold must be delivered at the place where they are at the time of the sale; unless some other place is required by the nature of the articles, or by the usage of trade, or the previous course of dealing between the parties, or is to be inferred from the general circumstances of the case.⁶ The

¹ Co. Litt. 207, a; *Peytoe's case*, 9 Co. 79, a; *Smith v. Loomis*, 7 Conn. R. 110; *Garrard v. Zachariah*, 1 Stew. Alab. R. 272; *Savary v. Goe*, 3 Wash. C. C. R. 110; *Robinson v. Batchelder*, 4 N. Hamp. R. 46; *Lamb v. Lathrop*, 13 Wend. R. 95.

² 2 Kent, Comm. Lect. 39, p. 508; *Mason v. Briggs*, 16 Mass. R. 453; *Bailey v. Simonds*, 6 N. Hamp. R. 159.

³ *Chipman's Essay on Contracts*; 2 Kent, Comm. Lect. 39, p. 508, 509.

⁴ *Lobdell v. Hopkins*, 5 Cow. R. 514; *Minor v. Mitchie*, 1 Walk. Miss. R. 24; *Mason v. Briggs*, 16 Mass. R. 453; *Scott v. Crane*, 1 Conn. R. 255; 5 Conn. R. 76; *Slingerland v. Morse*, 8 Johns. R. 474; *Roberts v. Beatty*, 2 Penn. R. 65; 2 Kent, Comm. Lect. 39, p. 508.

⁵ *Ibid.*

⁶ 2 Kent, Comm. Lect. 39, p. 505; *Goodwin v. Holbrook*, 4 Wend. R. 380; *Pothier Traité des Obligations*, No. 512, 513; *Cod. Napoleon*, No. 1609; 7 *Toullier Droit Civil Français*, No. 90.

seller cannot, without just cause, remove the goods from the place where they are bought, to another place where the vendee will be subjected to greater trouble and expense in possessing himself of them; and if he do so, he will be bound to indemnify the buyer therefor.¹ If, however, a place of delivery be agreed upon, the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor bound to make a tender elsewhere.²

§ 309. Where goods are sold to be delivered to the consignee at a particular place, and are sent by ship, a delivery at the wharf is not sufficient unless notice be previously given to the consignee of their arrival, and sufficient time be allowed to enable him to receive and remove them, — even although, according to the terms of the particular contract, a delivery at such place with proper notice, would be sufficient.³ But, where the contract of sale does not contemplate any sending of the goods to the buyer, the seller is not bound to give notice that they are ready for delivery, but in an action of *assumpsit* for the price, it is sufficient for him to aver, that he was ready and willing to deliver them.⁴

§ 310. Thirdly, as to the time when delivery should be made. If any time be agreed upon, and the vendor fail to

¹ Pothier, *Contrat de Vente*, No. 52.

² Pothier distinguishes in this respect between contracts for a thing certain, as for all the wine in the vintage of the vendor, and contracts for a thing indeterminate, as for a pair of gloves, or a certain quantity of wine or corn. In the former case, the delivery should be made at the place where the commodity sold is at the time of the sale. In the latter case, the commodity should be delivered at the vendee's place of residence, unless the parties live near each other, and the thing is portable. Pothier, *Traité des Obligations*, No. 512, 213.

³ *Bourne v. Gatcliffe*, 7 Mann. & Grang. 850.

⁴ *Boyd v. Lett*, 1 Mann. & Grang. N. S. 222; *Jackson v. Allaway*, 6 Mann. & Grang. 942; S. C. 7 Scott, N. R. 875.

comply with the agreement, the vendee will not be bound to accept, if a compliance with the terms in respect of time be an essential consideration of the bargain.¹ So, also, if, by the neglect, or refusal, or inability of the vendor to deliver the goods sold at the agreed time, the vendee suffer injury, he will be entitled to damages therefor; as, if the goods be bought to sell again, and their market value falls between the time when they should have been delivered and when they are actually delivered. So, also, where a certain number of barrels of flour were sold, to be delivered on a certain day, the purchasers intending to ship it on board a certain vessel, and the flour was not offered until after it had become necessary to load the vessel, it was held that the vendee was not bound to accept it.² Time is not, however, ordinarily deemed to go to the essence of a contract, unless it is so expressly treated by the parties, or, unless it naturally follows from the circumstances of the case.³ And a mere neglect to deliver, at the agreed time, will not, ordinarily, entitle the vendee to object to the contract unless it works some injury.⁴ So, also, the failure of a party to a contract to complete it within the time limited thereby will not prevent him from recovering upon a subsequent performance of the agreement, if the delay were assented to by the other party.⁵ Yet, although time be not of the essence of the contract, upon an unreasonable delay on the part of the vendor to

¹ *Hipwill v. Knight*, 1 Younge & Coll. 415; *Coslake v. Till*, 1 Russ. R. 376; *Winshurst v. Deeley*, 2 Man. Gran. & Scott, 253; 2 Story, Eq. Jurisp. § 776, and cases cited. The same rule obtains in the French Law, except in cases of inability. Pothier, *Contrat de Vente*, No. 49 a.

² *Suydam v. Clark*, 2 Sandf. Sup. Ct. R. 133.

³ 2 Story, Eq. Jurisp. § 776; *Paton v. Rogers*, 1 Ves. & Beam. 351; *Thomas v. Dering*, 1 Keen, R. 729, 743, 747; *Voorhees v. De Meyer*, 2 Barb. Sup. C. R. 37.

⁴ *Ibid.*

⁵ *Smith v. Gugerty*, 4 Barb. Sup. Ct. R. 614.

comply with his contract, the vendee would be authorized, upon giving notice, to rescind the contract.¹

§ 311. In the next place, as to *symbolic* and *constructive* delivery. Where goods are ponderous or bulky, or cannot conveniently be delivered manually, or where they are not in the personal custody of the vendor, the law does not require an actual delivery thereof, but only that they should be put under the absolute power of the vendee; or that his authority as owner should be formally acknowledged; or that some act should be done typical of a surrender of them on the one side, and of an acceptance of them on the other. The transference of any article, which is a symbol or evidence of ownership; or the assertion of complete authority on the part of the vendee by acts consistent only with ownership, and assented to by the vendor, constitutes a sufficient constructive delivery.² Thus, the delivery of the key of a warehouse, containing the goods sold; or of the receipt, ticket, sale-note, dock-warrant, certificate, bill of parcels, or other usual type and evidence of title to goods in the situation of those sold, will be a sufficient symbolic delivery of them to pass the title.³ So, also, the delivery of the grand bill of sale will pass the title to a vessel at sea;⁴

¹ *Benson v. Lamb*, 9 Beavan, R. 502.

² *Chaplin v. Rogers*, 1 East, R. 192; *Blenkinsop v. Clayton*, 1 Moore, R. 328.

³ *Chaplin v. Rogers*, 1 East, R. 192; *Searle v. Keeves*, 2 Esp. R. 598; *Harman v. Anderson*, 2 Camp. R. 243; *Wilkes v. Ferris*, 5 Johns. R. 335; *Atkinson v. Maling*, 2 T. R. 462; *Hodgson v. Le Bret*, 1 Camp. R. 233; *Manton v. Moore*, 7 T. R. 67; *Hollingsworth v. Napier*, 3 Caines, R. 182; *Pleasants v. Pendleton*, 6 Randolph, R. 473; *Bentall v. Burn*, 3 Barn. & Cress. 423; *Van Blunt v. Pike*, 4 Gill, R. 270. Item si quis merces in horreo repositas vendide sit, simulat que claves horrei tradiderit emptori, transferret proprietatem mercium ad emptorem. Dig. Lib. 41 tit. 1, art. 9, § 6. See also Lib. 41, tit. 2, art. 1, § 21. *Pothier, Traité de la Propriété*, N. 200.

⁴ *Atkinson v. Maling*, 2 T. R. 465.

or the assignment of the bill of lading will transfer the property in goods at sea,¹ no other mode of delivery being practicable.

311 *a*. So, also, a *constructive* or *fictitious* delivery may be made by the doing of any act expressive of an intention to surrender to the buyer the property in the goods sold. Thus, a mere verbal order by the vendor to a bailee in presence of the vendee to hold the goods sold to the sole use of the vendee, would be a constructive delivery. So, also, the cutting of the spills of wine casks,² or the affixing of particular marks to the goods sold,³ will be sufficient to vest the property in the vendee. So, also, under an entire contract, a delivery of a part, where nothing beside remains for the vendor to do, will be sufficient to pass the title to the whole,⁴ although the vendor will not be entitled to claim payment therefor until a total delivery,⁵ and although his lien still remains.⁶

§ 311 *b*. Again, on the same principle, where goods are

¹ 2 Kent, Comm. Lect. 39, p. 500; Long on Sales, (Rand's ed.) 69.

² Anderson v. Scott, 1 Camp. R. 235 n.

³ Stoveld v. Hughes, 14 East, R. 308; Tansley v. Turner, 2 Bing. N. C. 151, 155; S. C. 2 Scott, R. 263. By the Roman Law the affixing of a mark to an article sold was only considered as a delivery when the article was heavy and difficult to remove. When it was light, the mark was only considered as a designation of the particular article and did not operate as a delivery. "Si dolium signatum sit ab emptore Trebatecis ait, traditum id videri, Labeo contra; quod verum est, magis enim ne submutetur signari solere, quam ut tradere tum videatur. Dig. lib. xviii. tit. 6, art. 1, § 2. But see Duvergier, 1 Droit Civil Français, § 107.

⁴ Hammond v. Anderson, 1 New, R. 69; Bunney v. Poyntz, 4 Barn. & Adolph. 568; Bloxam v. Sanders, 4 Barn. & Cres. 911; Mills v. Hunt, 20 Wend. R. 431.

⁵ Waddington v. Oliver, 2 New, R. 61; Champion v. Short, 1 Camp. R. 53; Bell on the Law of Sale, p. 83; Walker v. Dixon, 2 Starkie, R. 281.

⁶ Miles v. Gorton, 3 Crompt. & Mees. 504; Holderness v. Shackles, 8 Barn. & Cres. 612; Payne v. Shadbolt, 1 Camp. R. 427. See Ante, § 287.

stored and inaccessible to the parties, a constructive delivery would be sufficient ; for the law only requires such a delivery as is consistent with the nature and situation of the thing sold.¹ Thus, where the vendor, on the sale of certain logs, lying within a boom, took the vendor in sight of them, and showed them to him ; it was held to be a sufficient delivery, on the ground that no other delivery was practicable under the circumstances ; and that this act was intended as a delivery of the logs.²

§ 312. So, also, the delivery of a sample, if it be accepted as a symbolical delivery of the whole, or as a part delivery under an entire contract, will transfer the title of the whole. And this is especially the case where the goods are ponderous or bulky, or where the vendor has them not in his personal custody, — as, if they be in the custody of the officers of government, and where they could not be actually delivered, until the seller had paid the duties.³ Ordinarily, however, the delivery of a sample will not be a sufficient delivery to pass the title to the whole of the goods sold. So, also, the delivery to the vendee of an order on the warehouseman, in whose warehouse the goods sold are stocked, is sufficient to pass the title, but not to destroy the lien of the vendor.⁴ For the lien remains so long as the vendor retains a special claim, or right to retain the goods, until a certain condition is performed ; or

¹ *Anderson v. Scott*, 1 Camp. R. 235 n. ; 1 Bell, Comm. 176 ; *Barney v. Brown*, 2 Vermont, R. 374 ; *Jewett v. Warren*, 12 Mass. R. 300 ; *Stephenson v. Clark*, 20 Vermont, (5 Washburn,) R. 624.

² *Jewett v. Warren*, 12 Mass. 300 ; 2 Kent, Comm. Lect. 39, p. 501 ; *Sanborn v. Kittredge*, 20 Vermt. (5 Washburn,) R. 632.

³ *Hinde v. Whitehouse*, 7 East, R. 558.

⁴ *Dodsley v. Varley*, 12 Adolph. & Ell. 632. See Ante, § 289 ; *Searle v. Reeves*, 1 Esp. N. P. C. 598 ; *Harman v. Anderson*, 2 Camp. R. 243 ; *Graves v. Hepke*, 2 Barn. & Ald. 131 ; *Legg & Lehman*, 8 Black. (Ind.) R. 148.

until, under other circumstances, the warehouseman agrees to hold the goods as bailee of the vendee. And the same rule would hold if the goods were in the warehouse of the vendor, and the vendee should pay rent therefor; since such a charge is consistent only with ownership, although it may not necessarily indicate an absolute right of possession.¹

§ 312 *a*. So, also, any formal act, intended as a delivery, will be sufficient to transfer the title, although the property be not touched. Thus, where the subject of sale was ninety-three tons of iron, lying by itself; and the parties met at the place where the iron was, and agreed upon the price and the mode of payment, and they then stepped up to the iron, and the vendor said to the vendee, "I deliver you this iron at that price;" after which, before the iron was moved, it was claimed and taken away by a third person; it was held, that this was an actual delivery by the vendor, and a receiving by the vendee.² But a mere transfer on the books where the articles were not set aside or separated from the bulk, or distinguished in any way from the vendor's property, would not be a sufficient delivery.³

§ 312 *b*. This species of delivery, also, was recognized in the Roman Law under the title of *Traditio longæ manus*, whenever any thing was sold which, on account of its great size and weight, could not be removed, as columns, casks of wine, no actual delivery was necessary; the vendor could take

¹ *Ibid.*; *Bentall v. Burn*, 3 Barn. & Cres. 423; *Bloxam v. Morley*, 4 Barn. & Cres. 952; *Townley v. Crump*, 4 Adolph. & Ell. 58; *Chaplin v. Rogers*, 1 East, R. 192; *Blenkinsop v. Clayton*, 1 Moore, R. 328; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Carter v. Touissant*, 5 Barn. & Ald. 855.

² *Calkins v. Lockwood*, 17 Conn. 154.

³ *Elliott v. Heginbotham*, 2 Car. & Kirw. 545.

possession "*oculis et affectu*."¹ So, also, the delivery of the keys of a cellar of wine, or of a barn filled with grain, was held to be a sufficient delivery if made in sight of the cellar or barn ; but it seems to have been necessary that the place or article should be in sight.² So, also, if a creditor order a debtor to lay

¹ Dig. Lib. xli. tit. 2, art. 1, § 21. "Si jusserim venditorem procuratorem tradere, quum ea in præsentia sit, videri mihi traditam Priscus ait ; idemque esse, si numos debitorem jusserim alii dare ; non est enim corpore et tactu necesse apprehendere possessionem, sed etiam oculis et affectu ; et argumento esse eas res, quæ propter magnitudinem ponderis moveri non possunt, ut columnas ; nam pro traditis eas haberi, si in re præsenti consenserint ; et vina tradita videri, quam claves cellæ vinariæ emtori traditæ fuerint."

² Dig. Lib. xli. tit. 1, art. 9, § 6 ; Ibid. art. 18, § 2 ; Dig. Lib. xlv. tit. 3, art. 79 ; Dig. Lib. 18, tit. 1, art. 4. It is not necessary in the French Law, that such a delivery should be made in sight of the place where the thing to be delivered is stored. See Pothier, *Contrat de Vente*, § 315.

Herr von Savigny, in his very able and celebrated Treatise on the Law of Possession, opposes the doctrine which has been usually received in respect to symbolical and constructive delivery of possession. He insists that there was no symbolical delivery, no *ficta traditio*, in the Roman law, but that the acts treated by interpreters as symbolical instead of bearing that character operated to give actual possession, which Savigny defines to be the power of the vendee of disposing of the thing at his pleasure. The following extract from an analysis of his work by Warnkönig (translated for the American Jurist, by Mr. Cushing,) is interesting in this place. After citing some texts in respect to landed property, he says, "From these texts it results, that the apprehension of an immovable takes place whenever we dispose of it, or whenever we are in a situation to dispose of it. It is not necessary that we should really touch the ground." "The apprehension of movable things must be considered under the same point of view. There are some things, without doubt, which we possess, because we hold them in our hands ; as, for instance, a piece of money, which one gives us : but there are others, of which no person would contest the possession, though we should not as yet have touched them in any manner. We shall find, in this respect, in the Roman law, the following examples :

1. "The marks which I make upon pieces of timber, with the consent of him who wills to give me the possession of them, constitute an apprehension of possession on my part.

down on the table a sum of money which he owes, as soon as it is put down the possession and property is transferred.¹

2. "The bag of money, which one puts under my eyes, declaring at the same time, that he gives it to me, becomes, by that act alone, within my detention.

3. "The same effect is attached to the declaration, that one transmits to me the possession of certain objects, such as bales, boxes, &c., when these things are under my eyes.

4. "The execution of an order to remit an object to some one for me, confers the possession of the object upon me.

"In regard to movables, therefore, apprehension takes place by our presence near an object, accompanied by an act which renders us the master of it. This act is necessary, for one may be very near a thing without being able to dispose of it; as, for example, a hunter cannot dispose of the game which he is pursuing, even though he has wounded it; for, says the law 5, § 1, D. 41, 1, *multa accidere possunt, ut eam (bestiam) non capiam*.

"Among the examples of apprehension which the texts present, we find also the case, in which one delivers to us the keys of a building which contains the things, of which we wish to acquire the possession; — this delivery confers upon us the possession. The interpreters have always regarded this delivery of the keys as a symbol of the delivery of the objects themselves; and this example is everywhere cited, in order to give an idea of the symbolical delivery. But a very natural reflection seems to have escaped the attention of these authors, namely, that he who has the keys of a house, or chest, &c., may, if he is near such house or chest, dispose of the objects which they contain; and it is in this last case that the Roman juriconsults regard a delivery of the keys as equivalent to a real delivery of the objects. There is, therefore, no need of having recourse to a fiction, or to a symbolical delivery, in order to explain this decision.

"It is not even necessary in all cases to be near the things which we will to possess, in order to have the detention of them. Thus, though at a distance, we possess an object deposited in our house, where no person can come to take it from us; in the same manner, also, we have the possession of a treasure, which we have concealed, even in the ground of another, so long as this possession is not ravished from us by the carrying away of the treasure.

"From all these examples, it evidently results, that the principle which directed the Roman juriconsults in the solution of these questions, is not the necessity of a real contact of the person with the thing which he has the

¹ Dig. Lib. xlv. tit. 3, art. 79.

§ 313. A delivery may also be *absolute* or *conditional*. And, in the latter case, the property will vest in the buyer only upon his performance of the condition. If the condition be precedent, as, if the seller agree to sell the goods, upon condition that he shall previously receive a certain security ; or, that the buyer do a certain act ; or, that a certain occurrence shall take place ; the condition must be performed before the property attaches to the buyer.¹ So, also, if goods be taken on trial, and the buyer agree to keep them, provided they suit his purpose, — until his assent is either expressly or impliedly given, no property attaches. Again, if the condition be subsequent, — as, if the seller part with the goods, upon condition that the buyer shall furnish him with certain securities within a few days ; or, if goods be delivered before the price is paid, in compliance with the usage of trade ; the delivery is conditional, — and, until the condition is performed, the vendee holds the goods in trust for the vendor against all persons,² except a *bonâ fide* purchaser, without notice.³

will to possess, or the existence of a fiction, which takes the place of such a contract ; but, on the contrary, their doctrine is, that there is a detention, whenever one puts himself in a situation to dispose of an object at his pleasure, by doing, or concurring in the doing of an act, to which that effect must unavoidably be attributed. In order, therefore, to have the detention of a thing, it is sufficient to have the power of disposing of it, though we should not make use of that faculty ; and it is this principle which leads Savigny to remark, that ‘detention must be regarded as the physical and immediate possibility of disposing freely of a thing, that is to say, of making that use of it which comports with its nature.’ The possession lasts as long as we preserve this faculty.”

¹ Barrett v. Pritchard, 2 Pick. R. 512 ; Bishop v. Shillitto, 2 Barn. & Ald. 329, (n).

² Haggarty v. Palmer, 6 Johns. Ch. R. 437 ; Lord Seaforth’s case, 19 Ves. R. 235 ; D’Wolf v. Babbitt, 4 Mason, R. 294 ; Whitwell v. Vincent, 4 Pick. R. 449.

³ Ibid. ; Hussey v. Thornton, 4 Mass. R. 405 ; Marston v. Baldwin, 17 Mass. R. 606 ; Corlies v. Gardner, 2 Hall, N. York S. C. R. 345 ; Reeves v. Harris, 1 Bailey, (S. Car.) R. 563 ; 2 Kent, Comm. Lect. 39, p. 497.

§ 314. If a purchaser of goods, the title of which has been passed to him in any of the foregoing modes, unreasonably refuse to accept them, the vendor is under no obligation to allow them to perish in his hands, or to become reduced in value. The proper course for him to pursue, if the vendee refuse or neglect to come and take the goods within a reasonable time, is, to bring an action for the price, alleging, that he is ready and willing to deliver. But his remedy is not restricted to this form of action, but he may, if he so elect, after giving due notice, proceed to sell them at auction, and to hold the buyer responsible for the difference between the price which they actually bring, and the price which he agreed to give.¹

§ 315. Where the contract of sale is executory, and for an article which is not in existence at the time of the sale ; but is to be manufactured or made, or is to be grown, no property therein passes to the vendee, until the thing is not only completely finished and ready, but is either actually delivered to him, or at least is set aside and appropriated to him, and accepted by him. Nor does it make any difference in this respect, that the price is advanced ; or that the specific dimensions are stated in the contract ; or that the time and mode of payment are therein agreed upon ; since the seller is understood to contract to buy the whole completed thing, and not the mere parts of it.² Until the article is so set aside for the vendee, and accepted by him ; or until it is actually delivered, he acquires no property therein, and no special right to

¹ 2 Kent, Comm. Lect. 39, p. 505 ; *Sands v. Taylor*, 5 Johns. R. 395 ; *Adams v. Minick*, cited 5 Serg. & Rawle, 32 ; *Girard v. Taggart*, 5 Serg. & Rawle, 19 ; *Maclean v. Dunn*, 1 Moore & Payne, 761 ; S. C. 4 Bing. R. 722. See Post, § 436.

² *Laidler v. Burlinson*, 2 Mees. & Welsb. 614 to 617 ; *Goode v. Langley*, 7 Barn. & Cres. 26 ; *Clarke v. Spence*, 4 Adolph. & Ell. 448 ; S. C. 6 Nev. & Man. 399 ; *Simmons v. Swift*, 5 Barn. & Cres. 857 ; *Mucklow v. Mangles*, 1 Taunt. R. 318 ; *Wilkinson on the Law of Shipping*, ch. 2.

claim it; and the vendor may, if he choose, before appropriating any particular article built to the order of the vendee, dispose of it to another person, unless the vendee have employed a superintendent or have furnished materials.¹ But, if the vendee have contracted that a particular thing shall be built under the superintendence of a person appointed by himself, the maker is thereby precluded from disposing of it to any other person than the vendee, except with the consent of the latter; for otherwise, the vendee might be burdened with the expense of reemploying the superintendent to supervise the building of another similar thing.² So, also, in such a case, the vendee would only be bound to accept an article which was approved of by the superintendent.³ But the mere fact of employing such a superintendent would not vest in the vendee any property in the article until it should be completely finished and approved of by the superintendent, and accepted by him; or, at least, set aside for him.⁴

§ 316. But if the agreement be, that the work shall be paid for by instalments, made at certain stated times during its progress, then so much of the thing as is finished at the payment of each instalment becomes the property of the vendee, subject only to the right of the vendor to retain it, for the purpose of completing it and earning the price.⁵ The payment of

¹ Ibid.; *Clarke v. Spence*, 4 Adolph. & Ell. 448; S. C. 6 Nev. & Man. 399. Ante, § 296.

² *Woods v. Russell*, 5 Barn. & Ald. 942; S. C. 1 Dowl. & Ryl. 587; *Laidler v. Burlinson*, 2 Mees. & Welsb. 614 to 617; *Clarke v. Spence*, 4 Adolph. & Ell. 448.

³ Ibid.

⁴ Ibid.

⁵ *Clarke v. Spence*, 4 Adolph. & Ell. 448; *Woods v. Russell*, 5 Barn. & Ald. 942; *Laidler v. Burlinson*, 2 Mees. & Welsb. 614 to 617; *Atkinson v. Bell*, 8 Barn. & Cres. 282; *Carruthers v. Payne*, 5 Bing. R. 277; *Oldfield v. Lowe*, 9 Barn. & Cres. 73, 78.

each instalment is, therefore, a specific delivery of the article, as far as it is finished, so as to vest the property in the vendee; and the rights of both parties would be the same, as if the article, as it exists at the payment of any instalment, belonged to the vendee, and was delivered to the vendor to repair or finish. In case, then, that the article should be destroyed between the payment of any of the instalments, the vendor would lose the value of his additional work, done since the previous instalment, and the vendee would lose the price advanced.¹

§ 317. But when materials are supplied by the vendee to be manufactured, the article to be manufactured becomes the property of the vendee, as fast as the material and work are incorporated, and no delivery is necessary to render the article, in whatever state it may be, the property of the orderer. In case of destruction, therefore, the vendee must not only bear the loss of the materials, but he is also liable for the worth of the work done upon them.² This general rule may, however, be controlled by the special agreement of the parties, or by the general usage or custom of trade.³

¹ Ibid.

² Story on Bailments, § 426, 426 a; Pothier, *Contrat de Louage*, No. 433; 1 Bell, *Comm.* p. 456, 457; *Menetone v. Athawes*, 3 Burr. 1592; *Gillet v. Mawman*, 1 Taunt. R. 137.

³ *Gillet v. Mawman*, 1 Taunt. R. 137; Story on Bailments, § 426, (a).

CHAPTER XI.

OF STOPPAGE IN TRANSITU.

§ 318. THE next question, which demands attention, is in respect to the right of Stoppage *in Transitu*. This is a right, possessed by the seller, to reassume the possession of goods not paid for, while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. This right was formerly unknown to the ancient Common Law, but has with the growth of commerce been introduced into the law merchant from Equity, in which it was first founded; and has become a permanent and favored legal right, instead of a merely equitable claim.¹

§ 319. It will be recollected, that, where goods are sold, the property passes to the vendee as soon as the vendor has performed everything which he is required by custom, or contract, to do, in relation to the goods; but, that the vendee cannot take the goods until payment of the price, unless with the consent of the vendor, or unless credit be given. The vendor has thus a lien for the price upon the goods sold, as long as he retains them in his possession, or has any special right to them. But the right of stoppage is an extension of the right of lien, by which the vendor is enabled, after surrendering the posses-

¹ Edwards v. Brewer, 2 Mees. & Welsb. 337; Wiseman v. Vandeput, 2 Vern. R. 203; Cross on Lien, § 362; Snee v. Prescott, 1 Atk. R. 245; D'Aquila v. Lambert, Amb. R. 39.

sion of the goods sold, to reclaim them at any time before they reach the vendee in case of the insolvency of the latter. It will be perceived that these two rights of lien and stoppage *in transitu*, although they are very similar, are not identical. The right of lien can only be exercised upon goods which are in the actual or constructive possession of the vendor, and in respect to which no delivery has taken place; but the right of stoppage *in transitu* is properly exercised only upon goods which are in passage, and are in the hands of some intermediate person between the vendor and the vendee, in process and for the purpose of delivery. In the one case there is an incipient delivery, or at least a resignation of possession; and in the other, there is not. The criterion, therefore, whether the vendor retains a right of stoppage, is not to be found in the question whether he has lost possession, but, whether the vendee has acquired possession. When possession is surrendered by the vendor, his lien is gone, but his right of stoppage remains until the vendee has acquired possession. In a word, the right in the one case is to *retain* possession, the right in the other is to *regain* possession.¹

§ 320. The contract of sale is not rescinded by the exercise, on the part of the vendor, of his right of stoppage *in transitu*, but the only effect of such an act is to repossess both parties of the same rights which they had before the vendor resigned his possession of the goods sold.¹ It reverts, therefore, in the seller, his lien for the price, but it gives him no better claim to the goods than he had after the sale, and before transmission thereof. The vendee may, therefore, at any reasonable time after the vendor has stopped the goods, enforce his claim to

¹ Brown on Sales, § 638 to 643; Lickbarrow v. Mason, 6 East, R. 27, note; Whitaker on Stoppage in Transitu, 149; Cross on Lien, 362; Dixon v. Yates, 5 Barn. & Adolph. 339; Bloxam v. Sanders, 4 Barn. & Cres. 948; Sweet v. Pym, 1 East. R. 4.

them by the payment of the purchase-money, according to the original terms of the contract ; and the vendor may, also, notwithstanding his exercise of the right of stoppage, maintain an action against the vendee for goods bargained and sold, provided that he be ready and willing to surrender the goods according to the terms of the original agreement.¹ Thus, if certain goods be sold for £500, and be stopped *in transitu*, and, while in the possession of the vendor their market value rises to £1,000, the vendor is bound to surrender them upon tender or payment of the original price of £500.² Again, by the operation of the same rule, it is evident that if, by the peculiar form or terms of the contract, no property is to vest in the buyer until the goods are delivered to him ; or until he has had an opportunity of examining them ; or if the specific goods sent are in answer to a general order, a stoppage *in transitu*, would revert in the seller the complete and absolute property in the goods, and he could dispose of them as he pleased. Thus, if A should send to B a written order for a certain number or quantity of goods, answering to a certain description therein contained, and B should procure such goods, and, after forwarding them, should stop them on their passage, he would have the same rights as if he had never complied with the order, since the property in them would always have continued in the vendor, until acceptance by the vendee.³

¹ *Wentworth v. Outhwaite*, 10 Mees. & Welsb. 436, 452 ; *Kymer v. Suwercroft*, 1 Camp. R. 109 ; *Hodgson v. Loy*, 7 T. R. 440 ; *Rowley v. Bigelow*, 12 Pick. R. 313 ; *Long on Sales*, Rand's ed. 337, and cases cited ; 2 Kent, Comm. Lect. 39, p. 541 ; *Edwards v. Brewer*, 2 Mees. & Welsb. 378 ; *Miles v. Gorton*, 2 Crompt. & Mees. 512 ; *Boorman v. Nash*, 9 Barn. & Cres. 145 ; *Clay v. Harrison*, 10 Barn. & Cres. 99. The inclination of the better opinion in relation to this subject is in favor of the rule as stated in the text. See *James v. Griffin*, 2 Mees. & Welsb. 623.

² *Buller, J.*, in *Lickbarrow v. Mason*, 6 East, R. 27. See, also, *Snee v. Prescott*, 1 Atk. R. 245.

³ *Atkinson v. Bell*, 8 Barn. & Cres. 277 ; *Clay v. Harrison*, 10 Barn. & Cres. 99. The following note is appended to the report of that case which

But, if the vendee should have seen particular goods in the shop of the vendor, and should identify them in his order, and the vendor should thereupon send the particular ones he identified, a stoppage *in transitu* would only reinvest the seller with the possession, and not with the property; since the buyer would, in such a case, have appropriated the specific goods, so as to render them his property.¹ In a word, stoppage *in transitu* never reverts the property in the vendor, if it have once been parted with, but only the possession.

§ 321. The effect of the exercise of the right of stoppage, operating as it does, to reinstate the parties in the same rights that they had before the seller parted with possession, is not solely to give the seller his right of lien, but also all rights growing out of the original contract.² The rights, which he acquires

is said by Parke, B., in *James v. Griffin*, 2 Mees. & Welsb. 623, to be correct to his knowledge. "It appears from the special case, that by the contract between the bankrupt and the vendors, the latter were to supply a cargo of timber. There was no bargain for any specific ascertained chattel, but the vendors were at liberty to supply any timber answering the description of that ordered; and, consequently, no property passed till the cargo of timber was appropriated by the vendors to the vendee, by the delivery on board the ship. The subsequent stoppage *in transitu*, supposing it had only the effect of revesting the possession in the vendors, and placing them in the same situation as if they had not parted with the goods, destroyed the effect of that delivery, which was the only circumstance which vested the property in the vendee; and, consequently, the property revested in the vendors. They then were exactly in the same condition as if the goods had always remained in their warehouses; and in that case the bankrupt would have had no interest in the goods; his rights, if any, would have rested in contract merely." See, also, Cross on Lien, p. 401; *James v. Griffin*, 2 Mees. & Welsb. 623.

¹ *Rhode v. Thwaites*, 6 Barn. & Cres. 388. In this case there was an actual appropriation by the seller assented to by the buyer, and therein the case differs from *Atkinson v. Bell*, 8 Barn. & Cres. 277.

² *Wentworth v. Outhwaite*, 10 Mees. & Welsb. 450; *James v. Griffin*, 2 Mees. & Welsb. 623.

then by a stoppage, are more extensive, than would be included in his right of lien. For, if credit were given, his lien would be lost, and his claim to retain the goods, gone; but still, in virtue of the original contract of sale, he would have a right to retain the goods, although credit were given, if, before they were delivered into the actual possession of the vendee, the latter should become insolvent.¹ For every contract of sale, in which credit is given, implies, as its terms, that the seller will deliver to the buyer the goods sold, before payment is made, on condition that the buyer do not become insolvent, or incapable of paying, before delivery; in which case, the seller shall have a right to hold them, as if no credit were given; that is, until payment.² A seller has, indeed, no lien on goods sold on credit, but, nevertheless, he is not bound to surrender them without payment, if, before he surrender them, the buyer be prevented, by accident or misfortune, from complying with the terms of the contract; that is, if his credit turn out to be good for nothing; for, in such a case, the worth of his credit is the essential consideration of the contract, and a failure thereof would be a failure of consideration. The vendor's right of stoppage *in transitu*, supersedes the carrier's or wharfinger's lien for a general balance of account due from the consignee to either of them; but it does not supersede their lien for the price of the carriage, or storage of the specific goods, in respect to which the vendor exercises his right of stoppage, and the latter can only reclaim the goods by payment of the charge upon them.³ Nor does it make any difference, that it is the usage for land-carriers to retain goods, as security for a general balance of account between them and the consignee.⁴ So, also,

¹ Kinlock v. Craig, 3 T. R. 119, 783.

² Roper v. Coombes, 6 Barn. & Cress. 534; Cross on Lien, p. 403.

³ Oppenheim v. Russell, 3 Bos. & Pull. 42; Morley v. Hay, 3 Mood. & Ry. 396; 2 Kent, Comm. Lect. 39, p. 541.

⁴ Ibid.

such a usage will not authorize the carrier to detain goods from the consignee, if the carriage is to be paid by the consignor.¹

§ 322. The consideration of this subject naturally resolves itself into three questions. 1st. Who may exercise the right of stoppage *in transitu*? 2d. How it may be exercised; and 3d. When and under what circumstances it can be exercised?

§ 323. In respect to the first question, the rule is, that the right of stoppage is confined to a vendor or to a consignor, to whom the vendee is liable for the price. If, therefore, a person abroad, in pursuance of orders sent to him, procure goods answering to the order upon his own credit, so that he is liable therefor to the vendor, and transmit them to the orderer, charging a commission, he is entitled to stop them *in transitu*; since, as far as concerns the orderer, he is the sole vendor.² So, also, a person sending goods to be sold on the joint account of himself and his consignee, has a right of stoppage.³ So, also, where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them *in transitu*, and give them a new direction adverse to his principal; but, if he give them a fresh destination in furtherance of the usual course of business of the principal, they pass to the assignees, as in the order and disposition of the bankrupt.⁴ So, also, a person remitting money on a particular account, and for a special purpose, may stop it on its way, in case of the consignee's insolvency; but this right cannot be exercised in the case of a general remittance, made either in whole payment, or on account of a debt, from a debtor to his creditor.⁵ So, also, an alien enemy, trading with a British subject, who

¹ Butler v. Wolcott, 5 Bos. & Pull. 64.

² Feise v. Wray, 3 East, R. 93.

³ Newsom v. Thornton, 6 East, R. 17.

⁴ Hawkes v. Dunn, 1 Tyrw. R. 413; S. C. 1 Crompt. & Jerv. 519.

⁵ Smith v. Bowles, 2 Esp. R. 278; Vertue v. Jewell, 4 Camp. R. 31.

purchases under a license from the crown, has been held to have a right to stop the goods sold, the license being considered as legalizing the contract of sale, and its incidents.¹ But the mere fact, that a person has become surety for the payment of the price of goods sold, will not entitle him to stop them *in transitu*; since there is no *primary* liability on his part to pay the price.² So, also, a person having a mere lien upon goods, without any property in them, — as, if his lien be for work done, has no right of stoppage *in transitu*, although his employer become insolvent before the goods reach him;³ and, since his lien would be destroyed by such a voluntary parting with the goods, as is incidental to his right of stoppage. Nor has a Court of Equity jurisdiction in any case to stop goods *in transitu*.⁴

§ 324. Again; it is not necessary that the vendor or consignoir should personally exercise his right of stoppage; if his general or special agent act for him, and he recognizes and confirms the act, it will be sufficient. But, if a third person, not being an agent, without any authority from the vendor, stop the goods, his act will not enure to the benefit of the vendor, although it be subsequently adopted by the latter.⁵ So, also, even a countermand of the goods made by the buyer, in favor of the seller, will be inoperative, if it interfere with the rights of third persons; or if the vendor do not assent to the stoppage.⁶ But if the interests of no third person intervene, the buyer may countermand the goods; provided, that

¹ Fenton v. Pearson, 15 East, R. 419.

² Siffkin v. Wray, 6 East, R. 371.

³ Sweet v. Pym, 1 East, R. 4; Nicholls v. Lawrie, 2 Bing. N. C. 83; Siffkin v. Wray, 6 East, R. 371.

⁴ Goodhart v. Lowe, 2 Jac. & Walk. 349.

⁵ Feise v. Wray, 3 East, R. 93.

⁶ Bartram v. Farebrother, Dan. & Lloyd, Merc. Cas. 42; S. C. 1 Moore & Payne, 515; 4 Bing. R. 579; Smith v. Field, 5 T. R. 404; Atkin v. Barwick, 1 Strange, R. 165; Harman v. Fisher, Cowp. R. 125.

the vendor agree to receive them again ; since this would merely operate as a rescission of the bargain, and not as a stoppage *in transitu*.¹ Indeed, inasmuch as the right of stoppage *in transitu* can only strictly be exercised in the case of the insolvency of the vendee, it is evident that the buyer can never stop the goods *in transitu* ; because such an act would amount to an improper preference of the seller over the other creditors, who have an equal right upon the goods, as assets of the bankrupt.² *A fortiori*, if the buyer have once accepted the goods, he cannot return them, when in insolvent circumstances.³ Thus, where a trader, to whom bags of wool had been delivered, pursuant to order, had, by the course of dealing, the option of returning the wool, for which he had no call, —and being from home when they were delivered, on his return, the same day, he gave directions not to have them opened or entered in his books, but only weighed off, to see that they agreed with the invoice ; he being then in embarrassed circumstances, and intending not to take them into the account of his stock, if, in the event, he found himself unable to pursue his business ; and afterwards, being avowedly insolvent, he returned the bags, with a letter, declaring his situation, hoping that they would have no objection to take back the wool, and requesting the favor of a line in approbation ; and it was held, that, as the letter of approbation was received after an act of bankruptcy, committed on the same day, the vendee could not restore the goods to the vendors, although there was no fraudulent concert between them ; and that, by his keeping possession so long, he lost his option of returning them.⁴ But,

¹ *Salte v. Field*, 5 T. R. 211 ; *Bartram v. Farebrother*, Dan. & Lloyd, Merc. Cas. 42 ; S. C. 4 Bing. R. 579.

² *Ibid.* ; *Bartram v. Farebrother*, 4 Bing. R. 579 ; *Barnes v. Freeland*, 6 T. R. 81 ; *Neate v. Ball*, 2 East, R. 123.

³ *Neate v. Ball*, 2 East, R. 123 ; *Barnes v. Freeland*, 6 T. R. 81 ; *Smith v. Field*, 5 T. R. 404.

⁴ *Neate v. Ball*, 2 East, R. 117.

if the rights of third persons be not compromised by the stoppage, the buyer may, with the assent of the seller, countermand the goods. Thus, where goods were countermanded by the consignee, while they were in the hands of the wharfinger, and the consignee, thereupon, ordered his attorney to write and inform the consignor, that he could not receive them, and he did so, and the consignor, in answer to the letter of the attorney, wrote back, consenting to take the goods; and on the day after his return-letter was received, an execution issued against the vendee; it was held, that this was not strictly an exercise of the right of stoppage *in transitu*, but a rescission of the contract, and, as the rescission had taken place by mutual consent before the execution, that the execution could not afterwards be levied on these goods.¹

¹ *Bartram v. Farebrother*, Dan. & Lloyd, Merc. Cas. 42; S. C. 1 Moore & Payne, 515; 4 Bing. R. 579. In this case, Mr. Chief Justice Best, in delivering the opinion of the Court, said; "This is an action against the sheriff, for taking in execution certain goods as the goods of Mungo Park, at the suit of one of M. Park's family. Now, when can an execution creditor take goods which his debtor has purchased? When the contract between the vendor and vendee is complete. If the contract be only suspended, that is enough to prevent the execution creditor from taking. But the contract here was altogether put an end to. The goods had been sold by a person in Scotland. On the 3d of November the vendee says, 'I decline having them;' he then proceeds to effect his repudiation of the contract in a clumsy way, by telling his clerk to order Vincent to stop the goods; but what he proposed and intended was, to get rid of the contract. This proposal, however, unless assented to by the vendor, would not have sufficed for the purpose; but notice was given to the wharfinger on the 3d, and on the 6th, one day before the goods were claimed in execution, the vendor agreed to the proposal. It has been asked, what would have been the consequence if the vendee had revoked his order to stop the goods? But it is sufficient for the present case to say that it was not revoked, and that on the 3d of November, there was a clear intention to put an end to the contract. Now, without referring to cases, it is perfectly clear, that, till the rights of third persons have intervened, contracting parties have a right to rescind a contract; and here, at the time the contract was rescinded, no such rights had intervened. But the point has been decided in *Atkin v.*

§ 325. The next question is, how may the right of stoppage *in transitu* be exercised. And in this respect the rule is, that

Barwick. I do not go the whole length of the positions laid down in that case; it is sufficient, however, if we should have decided in the same way, though not entirely for the same reasons. That was a case of bankruptcy, and it should be said for Pratt, C. J., that the doctrine touching matters done in contemplation of bankruptcy, was subsequently introduced into Westminster Hall. The case, however, was confirmed by *Salte v. Field*, where the property of goods bought by an agent for the vendee, and delivered by him to the vendee's packer, in whose hands they were attached by the vendee's creditors, was held to revest in the vendor, so as to avoid the attachment, by the vendee's having countermanded the purchase, by letter, to his agent, dated before such delivery, though not received till afterwards, the vendor assenting to take back the goods. That case was not decided, on the ground that no contract had existed. Lord Kenyon says, 'It was in the power of the buyer and seller to put an end to the contract as if it had never existed; and it is stated that the proposition made by the purchaser to rescind the contract, was acceded to by the sellers.' That shows that the principle was, not that no contract had existed, but that a contract had been rescinded. *Salte v. Field* was recognised in *Smith v. Field*, where the decision was different, because the rights of third parties had intervened; but Lord Kenyon took care not to impugn the principle established in *Salte v. Field*, saying, 'In the former case of *Salte v. Field*, the Court went as far as they could to assist the sellers; but there both the buyer and seller agreed to rescind the contract before the bankruptcy.' Each of the Judges confirmed the decision in that case, and also in *Atkin v. Barwick*. *Barnes v. Freeland* does not shake the authority of the previous cases. Lord Kenyon says, 'I cannot distinguish the present case from that of *Harman v. Fisher* on principle; for this bankrupt knew his insolvent situation at the time when he wished to deliver back the goods in question to the defendant, as well as Fordyce did in that case; there, Fordyce, finding that he was insolvent, was anxious to repay to the defendant some bills which the latter had lent him; and though those bills were as easily distinguishable from the rest of his effects as the iron in question was from the rest of this bankrupt's property, the Court there held, that it could not be done, because it would prejudice the other creditors of the bankrupt. Three cases, however, have been cited and pressed upon us, as deciding the present; but I think they are to be distinguished from this. In *Atkin v. Barwick*, the vendees, finding that their affairs were in a declining condition, before the goods arrived at their house in Cornwall, refused to accept the

it is not necessary for the vendor to take possession of the goods by a manual seizure of them, but, that it will be sufficient if he make claim to them, adversely to the buyer, during their passage. Thus, where a certain quantity of wine was conveyed to the king's warehouse to be sold, in consequence of the neglect of the consignee to pay the duties, and had not come to his possession, and, in consequence of his insolvency, the consignor made claim thereto ; it was held, that the claim was a sufficient exercise of the right of stoppage to prevent the proceeds of the wine, which was sold under the statute, from being distributable under a commission of bankruptcy issued against the assignee.¹ So, also, a notice to a carrier not to deliver goods to the vendee, is a sufficient stoppage, although the goods be, by mistake of the carrier, actually delivered subsequently to the vendee ; since the carrier thereby renders

goods, and thereby refused to become parties to the contract of sale ; and though, when the goods did arrive by the wagon, the vendees could not turn them loose in the streets, yet they did what was tantamount to rejecting them ; they sent them to a friend of the consignors for their use. In *Salte v. Field*, consider who was the party to the contract ; not the clerk of the vendee, who lived in London, but Dewhurst, who was residing in New York ; and he, knowing his insolvent situation, sent orders a month before the transaction in dispute took place, to his clerk here, not to purchase any more goods for him. The clerk, immediately on the receipt of this order, applied to the vendors to take the goods back again, who agreed to rescind the contract.' *Barnes v. Freeland* was decided on the ground that the acts were done in contemplation of bankruptcy ; but in the present case, there having been no bankruptcy, that principle does not apply. It has been argued that the goods in the present case were finally delivered before the stoppage took effect ; but it has never been held that goods in the hands of a carrier or wharfinger have been finally delivered except where the wharfinger has actually been the agent of the consignee ; and those cases have all turned on attempts to defeat a general body of creditors. In the present case the goods were not in the hands of the vendee, nor were they stopped to defraud a general body of creditors ; there is no ground, therefore, for impeaching the verdict which has been given, and the rule must be discharged."

¹ *Northey v. Field*, 2 Esp. R. 613 ; *Holst v. Pownall*, 1 Esp. R. 240.

himself liable therefor *in trover*.¹ A notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal, whose servant has the custody at such a time, and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee. Thus, where timber was sent by A, from Quebec, to be delivered to B, at Port Fleetwood in Lancashire, a notice of stoppage was given to the ship-owner at Montrose, while the goods were on their voyage, whereupon, the latter sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor; it was held that the notice was insufficient to entitle the vendor to stop the goods on the ground that the ship-owner had not the immediate custody of them.²

§ 326. We now come to the third question, when and under what circumstances the right of stoppage *in transitu* can be exercised. To enable the vendor to exercise this right, the goods sold must be unpaid for, — the vendee must be insolvent; — and the goods must be in transit.

§ 327. In the first place, the goods must be unpaid for; for, the non-payment of price by the vendee is the very touchstone to the right of stoppage *in transitu*. The vendor will, however, only be deprived of his right of stoppage by a payment of the whole price. The only effect of a partial payment will be to reduce his lien *pro tanto*, and not to deprive him of the right of repossessing himself of the goods, and holding every portion of them until the whole price is paid.³ So, also, if

¹ *Litt v. Cowley*, 7 Taunt. R. 169; *Holt*, R. 338; *Stokes v. De La Riviere*, cited in *Bohtlink v. Inglis*, 3 East, R. 397.

² *Whitehead v. Anderson*, 9 Mees. & Welsb. 535.

³ *Feise v. Wray*, 3 East, R. 102; *Hodgson v. Loy*, 7 T. R. 440; *Newhall v. Vargas*, 13 Maine, R. 93; 2 Kent, Comm. Lect. 39, p. 541.

credit be given by the vendee ; or a promissory note or bill of exchange be taken in payment ; the vendor has nevertheless a right, upon the insolvency of the vendee, to stop the goods *in transitu* and retain them without surrendering the bill or note, because of the partial failure of the consideration.¹ Nor would it make any difference, that the note or bill was indorsed over by the vendor to a third person.² If, therefore, in consideration of goods being consigned to him, a factor accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the vendee acquires possession of the goods, the consignor may stop them *in transitu*.³ So, also, if goods be sent in payment of an already existing debt, no right of stoppage *in transitu* exists, inasmuch as the debtor would be in the same predicament as a vendor to whom the whole price had been paid.⁴ But, where there are mutual liabilities on an unsettled account between vendor and vendee, the vendor has a right of stoppage, and is not obliged to wait for a final adjustment and balance of accounts.⁵ Thus, where a merchant in England sent goods of a certain value to a merchant in Quebec, to be sold on account of the former ; and before the goods were sold, and the proceeds ascertained, the latter shipped three cargoes of timber to the former, to credit on account, two of which arrived, and against the third of which the consignor drew a bill for the amount, while it was *in transitu*,—and the consignee, in the interval, became insolvent and dishonored the bill ; it was held that the consignor had a right to stop the timber, and was not bound to wait for an adjustment of the

¹ Feise v. Wray, 3 East, R. 93 ; Edwards v. Brewer, 2 Mees. & Welsb. 375 ; Stubbs v. Lund, 7 Mass. R. 453.

² Ibid.

³ Kinloch v. Craig, 4 Bro. P. C. 47 ; S. C. 3 T. R. 119, 783 ; Ilsley v. Stubbs, 9 Mass. R. 64, 65.

⁴ Smith v. Bowles, 3 Esp. R. 578 ; Vertue v. Jewell, 4 Camp. R. 31.

⁵ Wood v. Jones, 7 Dowl. & Ryl. 126 ; Kinloch v. Craig, 3 T. R. 119.

mutual accounts.¹ But, if the state of the accounts be such that a balance is due from the vendor to the vendee, which would more than cover the value of the goods consigned, the consignor has no right of stoppage.²

§ 328. Again, if the vendor, upon the insolvency of the vendee, accept of any composition for the debt due from the latter for the goods sold, his right of stoppage is thereby waived. As, where A, having in his possession a butt of wine, which he had sold to B, became a party to a deed of composition for a general debt, including the price of the wine, and declined to take back the wine, but said that B might take it at any time on payment of the duty; it was held that he could not stop the wine *in transitu*, his second agreement being a new contract of sale.³

§ 329. In the next place, we come to the second prerequisite of a right of stoppage *in transitu*; namely, that the vendee shall be insolvent; for this right can never be strictly exercised by the vendor, or consignor, except in case of the insolvency of the vendee. The vendor or vendee may, indeed, countermand the goods sold while they are on their passage, but such an act will be of no effect except by the consent of the other party, and it is, therefore, to be considered as a mutual agreement to rescind the contract, and not as an exercise of the strict right of stoppage *in transitu*. The insolvency of the vendee or consignee does not, of itself, remit to the vendor the possession of the goods; nor does it operate to rescind the contract; but merely to invest the consignor or vendor with the privilege of retaking the goods as a security for the price, if he choose to exercise it,—and if he, in fact, do exercise it before the goods come

¹ Wood v. Jones, 7 Dowl. & Ryl. 126.

² Vertue v. Jewell, 4 Camp. R. 31; Wood v. Jones, 7 Dowl. & Ryl. 126.

³ Nicholas v. Hart, 5 Car. & Payne, 179.

into the possession of the vendee or consignee.¹ Any well founded or probable information of such an embarrassment on the part of the other party, as to prevent him from honoring his drafts, or meeting the demands of his creditors, is a sufficient insolvency to justify the vendor in stopping the goods sold. But if, through excess of caution, or from misinformation, he make a mistake, and stop the goods when the buyer is not insolvent, the buyer would be entitled to claim the goods, and an indemnification for all the expenses growing out of the stoppage.² The right of stoppage, possessed by a vendor or consignor of goods, shipped to order, is a privilege allowed for the purpose of protecting him against the insolvency of the vendee, and, if the latter be not insolvent, the vendor cannot stop them, for that would amount to an unlimited power to vary the consignment at pleasure, which is inconsistent with the rights of the vendee, and might be productive of great mischief.³ If, indeed, the goods be shipped without orders, the seller may do as he pleases with them, since they are his own goods, and the vendor has no right of property in them.⁴ But, when goods are shipped to order, the consignor must hold to his agreement, and, if he have given credit, or taken a note, or bill of exchange, for the price, he cannot take possession of the goods on their passage, and insist upon immediate payment as the condition of delivering them, the consignee being willing to pay according to the original terms of the agreement, and not being insolvent.⁵

§ 330. We now come to the third prerequisite to the right of stoppage *in transitu* ; which is, that the goods, in respect to

¹ Ante, § 284.

² The *Constantia*, 6 Rob. Adm. R. 321.

³ *Walley v. Montgomery*, 3 East, R. 585 ; The *Constantia*, 6 Rob. Adm. R. 321 ; *Abbott on Shipp.* (Shee's ed.) 460, 461.

⁴ *Ibid.*

⁵ *Walley v. Montgomery*, 3 East, R. 585.

which it is claimed, must be in transit. So long as the goods sold are on their passage and have not come to the actual possession of the vendee, they may be stopped, but, as soon as they have come into his possession, or have arrived at their place of destination, the seller loses his power over them. It becomes, therefore, important to consider when and under what circumstances goods are deemed to be *in transitu*, and when they are deemed not to be *in transitu*; since this will determine whether the consignor has, or has not, at any particular time, a right of stoppage. And, since there are two modes in which the transit may be determined; namely, 1st. By delivery into the possession of the vendee; and 2d. By some intervening acts by the consignee before delivery; the subject naturally divides itself into these two branches, which we shall proceed to consider.

§ 331. And, in the first place, the transit may be determined by a delivery of the goods into the actual or constructive possession of the vendor. Upon this subject, the first remark to be made is, that the species of delivery required, in order to defeat the vendor's right of stoppage, differs from every other species of delivery, and care should be taken not to confound it with any other.¹ At the risk of excessive repetition, it may here be as well to restate the different species of delivery; since it is in respect to the question, as to what constitutes a sufficient delivery, that the student will find the greatest difficulty in harmonizing the cases, on account of a careless and indiscriminate use of the term *delivery*, to signify several entirely different things. There are, then, four different kinds of delivery, each operating to produce a certain and different result. 1st. A delivery sufficient to change the property; to constitute which, all that is required is, that the seller shall

¹ Cox v. Harden, 4 East, R. 211.

have performed his whole duty.¹ 2d. A delivery sufficient to destroy the lien of the seller; to constitute which there must be a complete surrender of possession.² 3d. A delivery sufficient to meet the requisitions of the statute of frauds; to constitute which, there must be a final acceptance, and absolute appropriation of the goods by the vendee.³ 4th. A delivery sufficient to defeat the vendor's right of stoppage *in transitu*, which is the subject under present consideration, and which occupies an intermediate place between the second and third classes, as above enumerated.

§ 332. In order to constitute such a delivery as will defeat the vendor's right of stoppage *in transitu*, the goods must have ceased to be in transit, and must have come into the hands of the vendee, or of some person acting for him. Where the goods sold come into the actual possession of the vendee, and within his "corporal touch," and are received by him as *owner*, the vendor cannot exercise his right of stoppage,—whether such possession be obtained by the arrival of the goods at the place designated by the vendee as the final place of present destination; or by a delivery at the warehouse of the vendee; or at a warehouse used by him, but belonging to another person; or by his personally intercepting the goods during their passage.⁴ But, if he refuse to take possession of them *as owner*, but, nevertheless, receive them in behalf of the vendor, and store them in his warehouse, the vendor may retake them if he choose, provided that the interests of third persons do not

¹ Ante, Ch. x. § 295, 296.

² Ante, Ch. ix. § 287 to 293.

³ Ante, Ch. viii. § 276 to 280.

⁴ James v. Griffin, 2 Mees. & Welsb. 632; Wright v. Lawes, 4 Esp. R. 82; Allen v. Gripper, 2 Crompt. v. Jerv. 218; Conard v. Atlantic Ins. Co., 1 Peters, R. 386; Foster v. Frampton, 6 Barn. & Cres. 107; Barrett v. Goddard, 3 Mason, R. 107; Wentworth v. Outhwaite, 10 Mees. & Welsb. 450; Cowas-jee v. Thompson, 5 Moore, R. 165.

intervene.¹ But this, as we have seen, is not strictly a right of stoppage *in transitu*, since it could not be exercised in case of the insolvency of the vendee, but it is rather a right to rescind the contract on the part of the vendee, when assented to by the vendor.²

§ 332 *a*. It is not necessary to the exercise of this right of stoppage *in transitu*, that the vendor or his agent should take actual possession of the goods, but it will be sufficient, if, before the *transitus* is ended, he give notice to the carrier or middleman of his resumption of ownership over the goods, or prohibit him from delivering them to the vendee or his assigns.³ But in order to make the notice effectual as an exercise of the right of stoppage *in transitu*, it must be given to some intermediate party between the vendor and vendee, at such time and under such circumstances as to enable him to prevent the delivery of the goods.⁴ A mere notice to the vendee, before the goods come to his possession, that the vendor wishes to exercise the right will not be sufficient.⁵

§ 333. Again, although the goods come into the actual possession of the vendee, yet, if they have been delivered to him through a mistake of the middleman, and after notice has been given to the latter not to deliver them, the vendor still retains his right to them by virtue of his previous notice, that being

¹ *Salte v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, Dan. & Lloyd, Merc. Cas. 42; 4 Bing. R. 579; *Smith v. Field*, 5 T. R. 404. Post, § 419.

² *Bartram v. Farebrother*, 4 Bing. R. 579; *Mills v. Ball*, 2 Bos. & Pull, 457.

³ *Mottram v. Heyer*, 5 Denio, R. 333; *Northey v. Field*, 2 Esp. R. 613; *Holst v. Pownall*, 1 Esp. R. 240; *Newhall v. Vargas*, 13 Maine R. 93.

⁴ *Whitehead v. Anderson*, 9 Mees. & Welsb. 518; *Mottram v. Heyer*, 5 Denio, R. 333.

⁵ *Ibid*.

a sufficient exercise of the right of stoppage.¹ But, although the goods sold come to their final place of destination, yet, if they be not in the actual possession of the vendee, but in the possession of the wharfinger, and the buyer refuse to accept them as owner, or have not acquired constructive possession of them, the wharfinger holds them as the agent of the vendor, so that the latter can stop them.² Thus, where the vendor of goods having ascertained, while they were in the hands of a wharfinger, that the original consignee had stopped payment, indorsed the bill of lading to the plaintiff, and directed him to take possession of the goods, and he, accordingly, demanded them of the wharfinger; it was held, that the right of stoppage *in transitu* was not determined when the plaintiff made the demand.³ So, also, where A ordered goods of B, in London, who sent them by ship consigned to A, and on their arrival, they were delivered to C, a wharfinger, on A's account, and the freight and charges were paid, and, after their arrival, A wrote to B, informing him, that in consequence of his affairs being deranged, he should not take the goods, and A afterwards became a bankrupt; it was held, that B still retained a right to stop the goods in the hands of C.⁴ So, also, where it appeared, that the consignee's agent or son allowed goods to be landed at the warehouse of a wharfinger, which the consignee used as his own for the purpose of stowing such goods without the directions of the consignee himself, the goods were held to be still *in transitu*, on proof being given, that the consignee told his son at the time that, under the circumstances in which

¹ *Litt v. Cowley*, 7 Taunt. R. 169; *Holt*, R. 338; *Stokes v. De La Riviere*, cited in *Bohtlingk v. Inglis*, 3 East, R. 397; *Northey v. Field*, 2 Esp. R. 613. Ante, § 325; *Mottram v. Heyer*, 5 Denio, R. 633; *Holst v. Pownall*, 1 Esp. R. 240; *Newhall v. Vargas*, 13 Maine R. 93.

² *James v. Griffin*, 2 Mees. & Welsb. 623; *Edwards v. Brewer*, 2 Mees. & Welsb. 375; *Mills v. Ball*, 2 Bos. & Pull. 457.

³ *Morrison v. Gray*, 9 Moore, R. 484.

⁴ *Mills v. Ball*, 2 Bos. & Pull. 457.

he was, he would not meddle with them, — although that fact was not disclosed to the wharfinger.¹

§ 334. It is not necessary, however, that the goods sold should come to the personal and actual possession of the vendee, before the vendor's right of stoppage is gone. If the vendee acquire a constructive possession of them, it will, ordinarily, be sufficient.² But no constructive possession of them will be sufficient, to defeat the vendor's right of stoppage, so long as they are either on their passage to their place of contemplated destination, or are in the possession of any person, who holds them for the purpose of transmission to the place of original destination, pursuant to the contract; whether such person be the agent of the vendor, or of the vendee.³

§ 335. The first criterion, then, by which it is to be decided, whether the goods are in the constructive possession of the vendee or not, is to be found in the question, whether they have reached the place to which, by the terms of the contract, they were originally to be carried. If such place be reached, the right of stoppage is lost; if it be not reached, the right still remains.⁴ In this inquiry, the unknown or ulterior destina-

¹ *James v. Griffin*, 2 Mees. & Welsb. 623. Lord Abinger, however, dissented, and thought that a declaration to the wharfinger or vendee, of the intention with which the consignee received the goods, was requisite, in order to prevent the termination of the transit.

² *Ellis v. Hunt*, 3 T. R. 464; *Morrison v. Gray*, 9 Moore, R. 484. *Mottram v. Heyer*, 5 Denio, R. 630. *Buckley v. Furniss*, 15 Wend., R. 137.

³ *Whitehead v. Anderson*, 9 Mees. & Welsb. 535; *Wentworth v. Outhwaite*, 10 Mees. & Welsb. 450; *Owenson v. Morse*, 7 T. R. 64; *Morley v. Hay*, 3 Mood. & Ry. 396.

⁴ 2 Kent, Comm. Lect. 39, p. 515; *Wright v. Lawes*, 4 Esp. R. 62; *Stokes v. La Riviere*, 3 East, R. 397; *Coales v. Railton*, 9 Barn. & Cress. 422; *Rowe v. Pickford*, 8 Taunt. R. 83; *Scott v. Petit*, 3 Bos. & Pull. 469; *Leeds v. Wright*, 3 Bos. & Pull. 320; *Hunt v. Ward*, cited 3 T. R. 167; *Dixon v. Baldwin*, 5 East, R. 175; *Hunter v. Beal*, cited 3 T. R. 466; *Stubbs v. Lund*, 7 Mass. R. 457.

tion to be given to the goods at some future time, according to circumstances, does not form a matter for consideration ; but only the place contemplated as the stopping-place of the goods, for the present, and as far as regards the original contract of sale.¹ If, therefore, by the agreement, the goods are to be sent to a particular place; and there deposited in the hands of a certain person, to await further orders ; or to be disposed of by him as he may think expedient ; or to be transmitted to a different market, away from the vendee, the vendor would be deprived of his right of stoppage, by a delivery of the goods at such a place ; for the obvious reason, that such a reception is the only reception of them which is contemplated by the buyer.² Thus, where goods were purchased by a merchant of London, of a cotton dealer at Manchester, to be forwarded to his agents at Hull, for the purpose of being shipped by them to Hamburg ; it was held, that, upon their arrival at Hull, the *transitus* was determined, the delivery to his agents at Hull being the only delivery contemplated by the vendee, to be made by the vendor, and the possession by the agents the only possession expected by the vendee.³ So, also, where A, a merchant at Birmingham, bought goods of B & Co., commission merchants at Manchester and Leeds, and the goods were, by A's direction, sent to L. & Co., at Liverpool, and by them shipped, according to his order, on board a vessel for Valparaiso — but, before the ship sailed, the goods were relanded by order of an agent of A, and sent to B & Co.'s house at Manchester, to be repacked in smaller cases, and, while they were there, A became insolvent, — it was held that the transit was ended when the goods came to the hands of L. & Co., that being

¹ Ibid. ; *Dodson v. Wentworth*, 6 Jur. 1066.

² Ibid. ; *Wentworth v. Outhwaite*, 10 Mees. & Welsb. 450 ; *Whitehead v. Anderson*, 9 Mees. & Welsb. 535 ; *James v. Griffin*, 2 Mees. & Welsb. 632 ; *Rowley v. Bigelow*, 12 Pick. R. 307 ; *Smith v. Goss*, 1 Camp. R. 282 ; *Stubbs v. Lund*, 7 Mass. R. 457.

³ *Dixon v. Baldwin*, 5 East, R. 175.

their nearest possession, contemplated by the vendee.¹ So, also, where a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent, shortly after their arrival in London, and, having no warehouse of his own, was accustomed to allow the goods consigned to him, to remain in the wagon-office of the carriers, until they were removed for the purpose of being shipped ; it was held, that the wagon-office was the terminus of the transit, and that the vendor could not stop the goods after their arrival at such a place.² So, also, where goods were sent from London, to be delivered to T. W., or his assignees, Milkley Hill, Yorkshire, and they were carried to Boroughbridge, where they were taken into a warehouse belonging to the Canal Navigation Co., who were in the habit of receiving parcels for T. W., and keeping them until he sent for them, but they were not his specifically authorized agents for such purpose, — and the goods were seized by the sheriff in behalf of certain parties, as being still *in transitu* ; it was held, that they were not *in transitu*, but belonged to T. W. ; on the ground, that Boroughbridge was, for the time, their ultimate place of destination, where they were to await the further orders of T. W.³ So, also, where goods were shipped at Troy and directed to the vendee at Vergennes, and were landed upon the wharf at Vergennes, which was half a mile from the vendee's place of business, and it was proved that the wharf was the usual place of the vendee's receiving goods in that town, and that, after they were landed upon the wharf, neither the wharfinger, nor any person for him, or for the carriers, had any charge of the goods, but that it was usual for the vendee, and others who received goods at that wharf, to receive the goods upon the wharf and transport them to their places of business, and it appeared that

¹ Valpy v. Gibson, 4 Man. Grang. & Scott, 837.

² Rowe v. Pickford, 8 Taunt. R. 83.

³ Dodson v. Wentworth, 6 Jur. 1066.

the goods were not subject to any lien for freight or charges, it was held, that the wharf was the place of ultimate destination of the goods intended by the consignee, and that the goods, when landed there, came into the constructive possession of the vendee, and were beyond the bounds of the vendor's right of stoppage *in transitu*.¹

§ 336. Another criterion, intimately connected with the first, is to be found in the determination of the question, whether the agent of the vendor holds the goods as a middleman between the vendor and the vendee, and for the purpose of transmission to him, or merely as a special agent or bailee, representing the vendee, and receiving the goods either for custody, or for sale, or other disposal, as the vendee shall direct. If the agent hold them for the purpose of transmission to the vendee, the vendor's right of stoppage exists; if he hold them for the purpose of custody, sale, or transmission to a foreign market, the vendor's right of stoppage is gone.² The question in these cases always is, whether the vendee contemplates any fuller or different possession of the goods, than he has while they are in the hands of his agent. If he do not, the vendor cannot stop them. If he do, the vendor has no such right. Thus, where goods were ordered by Messrs. Duhems, of Lisle, and were sent to their agents in London, to be forwarded to their correspondents at Ostend, and by them to be forwarded to Messrs. Duhems; it was held, that the goods were subject to the vendor's right of

¹ Sawyer v. Joslin, 20 Verm. (5 Washburn) R. 172.

² Dickson v. Baldwin, 5 East, R. 175; Coates v. Railton, 6 Barn. & Cres. 422; Rowe v. Pickford, 8 Taunt. R. 83; Wright v. Lawes, 4 Esp. R. 82; Fowler v. Kymer, cited in 3 East, R. 396; Stubbs v. Lund, 7 Mass. R. 457; Foster v. Frampton, 6 Barn. & Cres. 109; Hodgson v. Loy, 7 T. R. 440; Mills v. Ball, 2 Bos. and Pull. 457; Loeschman v. Williams, 4 Camp. R. 181; 2 Kent, Comm. Lect. 39, p. 545; Selw. N. P. 448; Leeds v. Wright, 3 Bos. & Pull. 320; Edwards v. Brewer, 2 Mees. & Welsb. 375; Stubbs v. Lund, 7 Mass. R. 453.

stoppage, until they arrived at Lisle, and came to the hands of the vendees; on the ground that each agent was an intermediate carrier.¹ So, also, where A, residing at Guernsey, employed the defendant, as his agent, at Southampton, to ship all the goods which arrived there directed to A, and the defendant paid the carriage and wharfage dues, and selected the ship, by which he forwarded the goods; it was held, that the transit of the goods was not ended at Southampton, and that the vendor might stop them, after they had been put on board a vessel for Guernsey.² So, also, where goods were purchased in Manchester, by Legrand & Co., of Paris, by their agent Moissoner, who had a general authority to send goods, where he thought it most beneficial for his principals, and he sent them to a packer, and while in the packer's hands, Legrand & Co. failed; it was held, that the transit was ended, and the delivery complete, so as to destroy all right of stoppage.³ So, also, where goods are placed on board a vessel, the delivery is not complete, if they be to be therein transmitted to the vendee, because a subsequent and actual possession is provided for by the bill of lading. But, if they be to be therein transported to a foreign market, away from the vendee, the delivery is considered complete, so as to destroy the right of stoppage; because no other and better possession than that, created by a delivery on board the ship, is contemplated, or can be made under the circumstances.⁴ Nor is the rule in such cases at all altered by the fact that the ship is chartered by the vendee, either for the particular voyage solely, or for a term of years; for, nevertheless, the master is a carrier, and the transit is not determined by delivery on board the ship, if the goods be to

¹ *Stokes v. La Riviere*, 3 East, R. 397.

² *Nicholls v. Le Feuvre or Slater*, 2 Bing. N. C. 81; S. C. 2 Scott, 146; 7 Carr. & Payne, 91.

³ *Leeds v. Wright*, 3 Bos. & Pull. 320.

⁴ *Stubbs v. Lund*, 7 Mass. R. 457; *Fowler v. Kymer*, cited in *Bohtlingk v. Inglis*, 3 East, R. 396; *Towler v. McTaggart*, cited in 7 T. R. 442.

be carried by him to the vendee. And if they be to be carried by him on a mercantile adventure, and not to the vendee, he is considered as the agent to receive the goods,¹ and the transit is ended. The real distinction between all such cases, being in the circumstances of the ultimate destination of the consignment, and not in the length of time, for which the vessel is chartered.

§ 337. So, also, it is by this criterion, that it is to be decided, whether goods, which are in the hands of a carrier, or wharfinger, or other intermediate person are subject, at any given time, to the right of stoppage. If the carrier or intermediate person, who has been employed in transmitting the goods, enter into a subsequent contract, either expressly or by implication, distinct from the original agreement for carriage, by which he agrees to hold the goods as the special bailee or agent for the consignee, for the purpose of custody on his account, the right of stoppage will be lost.² Thus, where goods were ordered of a house in Manchester, to be forwarded to the address of the buyer in London, at the Bull and Mouth, and thence they were sent to the house of the packer in compliance with the general orders of the vendee, that all goods sent to him should be sent to the vendee, he having no warehouse of his own; it was held, that, although a packer was generally to be considered as a middleman, yet, that under the circumstances of the present case, he must be considered as a special bailee of the custody of the goods, since, as the bankrupt had no warehouse of his own, the *transitus* could never be at an end if it was

¹ *Ilseley v. Stubbs*, 9 Mass. R. 65; *Stubbs v. Lund*, 7 Mass. R. 457; *Bohtlingk v. Inglis*, 3 East, R. 381; *Fowler v. McTaggart*, 7 T. R. 442; *Buck v. Hatfield*, 5 Barn. & Ald. 632; *Inglis v. Usherwood*, 1 East, R. 515; *Fowler v. Kymer*, cited in 1 East, R. 522; *Walley v. Montgomery*, 3 East, R. 585.

² *Whitehead v. Anderson*, 9 Mees. & Welsb. 534.

not ended when they arrived at the packer's.¹ Indeed, whenever a man uses the warehouse of a wharfinger or carrier as his own, and makes it the repository of his goods, and disposes of them there, the *transitus* will be ended by the arrival of the goods at such warehouse.² In all cases, however, where the goods remain in the hands of a carrier, the circumstances must distinctly show that he holds them in a new character, as special bailee of the custody ; and, if the consignee suffer them to remain in his hands under circumstances which show no express or implied agreement, on the part of the carrier, to hold them specially on account of the vendee, or which do not indicate clearly that no immediate better possession by the vendee is contemplated, the vendor will still retain a right of stoppage.³ For, so long as a carrier or middleman holds goods as a middleman, the vendor's right of stoppage remains in full force.⁴ Thus, where goods were consigned to A, deliverable at the port of London, and the vessel, on board of which they were shipped, arrived off the wharf, at which the captain was in the habit of trading, and the captain called at A's place of business and saw B, his clerk, (A being absent,) and pressed B to send a craft for the goods, or he should be under the necessity of landing them,—and after some days, B wrote to the captain, stating, that A was from home, but he (B) thought the goods should better be landed on A's account,—and the goods were accordingly landed and entered in the wharfinger's book, with

¹ *Scott v. Pettit*, 2 Bos. & Pull. 469 ; *Leeds v. Wright*, 3 Bos. & Pull. 320. •

² *Richardson v. Goss*, 3 Bos. & Pull. 119.

³ *Whitehead v. Anderson*, 9 Mees. & Welsb. 535 ; *Goss v. Richardson*, 3 Bos. & Pull. 119 ; *Ellis v. Hunt*, 3 T. R. 464 ; *Foster v. Frampton*, 6 Barn. & Cres. 107 ; *Wright v. Lawes*, 4 Esp. R. 82 ; *Hunt v. Ward*, cited 3 T. R. 467.

⁴ *Ibid.* ; *Nicholls v. Le Feuvre or Slater*, 2 Bing. N. C. 81 ; S. C. 7 Car. & Payne, 91 ; *Edwards v. Brewer*, 2 Mees. & Welsb. 375 ; *Jackson v. Nichol*, 5 Bing. N. C. 508 ; S. C. 7 Scott, R. 577 ; *Mills v. Ball*, 2 Bos. & Pull. 457.

“freight and charges” set opposite to them, and not in the name of any party, as consignee, — and while they were lying there, A became insolvent, and they were stopped by the consignor ; it was held, that the *transitus* was not determined.¹

§ 337 *a*. Again, where goods are deposited for the vendee in a public store, under the warehouseing system, and a proper entry is made, the *transitus* would be ended, — no further immediate action in respect to the goods being contemplated.² But the mere *entry* of the goods by the vendee at the custom-house, without the payment of the duties, and the obtaining of a permit to land the goods, would not determine the *transitus*, the vendor being required to comply with these duties before he can take actual possession.³ So, also, even if the goods be removed by the custom-house officers from the vessel to a public store, to be there held by them until the consignee should pay the duties, the right of stoppage would still adhere to the goods, — the public store being a mere substitution for the vessel, and the goods being no more in the possession of the consignee in the store than when on board the vessel.⁴ So, also, where goods shipped to a vendee arrived at their port of destination, and the vendee paid freight and gave his note for the price ; but the goods, in consequence of the loss of the invoice, were stored in the custom-house, and remained there until the dishonor of the note, — it was held, that the vendor’s right of stoppage remained, the goods not having arrived to their final destination, and the vendee not being entitled to personal possession.⁵

¹ Edwards *v.* Brewer, 2 Mees. & Welsb. 375.

² Mottram *v.* Heyer, 5 Denio, R. 631 ; Strachan *v.* The Trustees of Knox, cited in Brown on Sales, 536. Post, § 341.

³ Ibid. See, also, Donath *v.* Broomhead.

⁴ Mottram *v.* Heyer, 5 Denio, R. 631 ; Nix *v.* Olive, cited Abbott on Shipp. 490 ; Northey *v.* Field, 2 Esp. R. 613.

⁵ Donath *v.* Broomhead, 7 Barr, 301.

§ 338. Again, the mere taking of samples from goods in the carrier's hands, while they yet remain to be delivered, and no obstacle opposes the delivery thereof, will not be sufficient to end the transit, on the ground that the carrier stills holds them as carrier.¹ But, if obstacles oppose the delivery, and samples be taken as the best or only mode of taking possession, the right of stoppage will be gone.² So, also, if samples be taken, or the goods be marked, and the carrier agree to hold them, as bailee of the vendee, and especially if the vendee exercise acts of ownership, as by selling a part of the goods; the transit will be ended.³ And the ground upon which these two last species of cases proceeds, is, that the circumstances denote that the carrier was intended to keep the goods, and that he assented to keep them as an agent for custody. Thus, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them, and, for his own convenience, desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed became bankrupt; it was held, that the *transitus* was at an end.⁴ But, where goods were consigned to H., and on his becoming bankrupt, his assignee went to the inn, where they had arrived, and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt; it was held, that the transit was ended; because no better possession could be taken under the circumstances.⁵

§ 339. The question here arises as to the effect of a symbolical delivery upon the vendor's right of stoppage; and the

¹ Whitehead v. Anderson, 9 Mees. & Welsb. 535.

² Ellis v. Hunt, 3 T. R. 464.

³ Foster v. Frampton, 6 Barn. & Cres. 107; Jones v. Jones, 8 Mees. & Welsb. 431.

⁴ Foster v. Frampton, 6 Barn. & Cres. 107.

⁵ Ellis v. Hunt, 3 T. R. 467.

decision of this question will ordinarily be governed by the rule just stated. Where the goods are to remain in the warehouse of the vendor, no symbolical delivery will be sufficient to destroy his possession, and, therefore, inasmuch as the right of stoppage *in transitu* can only attach upon goods which are not in his possession, no question as between the vendor and the vendee solely can arise in respect to it. The only question in such a case, is in respect to the lien of the vendor, and this, as we have already seen, is not defeated by any constructive delivery, except it be the only practicable or feasible mode of surrendering possession; and except, also, that the goods are not to remain in the actual possession of the vendor.¹ The vendor may indeed lose his possession, and therewith his lien, in case the rights of a third party intervene; as if the vendee sell to a sub-vendee, — or assign to particular creditors, — or otherwise dispose of the goods. But in such case, also, the right of the vendor to stop them subsequently is destroyed, upon the ground that he cannot rightfully stop goods belonging to any other person than his vendee.²

§ 340. Where the goods are in the warehouse of a third person, as a wharfinger, and an absolute delivery order upon him is given to the vendee, the right of stoppage will be gone, as soon as that order is accepted by the wharfinger, since, by such acceptance he renders himself the bailee of the vendee.³

¹ Ante, § 288, 289, 290; *Miles v. Gorton*, 2 Crompt. & Mees. 513; *Townley v. Crump*, 4 Adolph. & Ell. 58; *Greaves v. Hepke*, 2 Barn. & Ald. 131; *Elmore v. Stone*, 1 Taunt. R. 458; *Green v. Haythorne*, 1 Stark. R. 447; *Hurry v. Mangles*, 1 Camp. R. 452; *Chapman v. Searle*, 4 Pick. R. 44; *Barret v. Goddard*, 3 Mason, R. 107.

² *Hurry v. Mangles*, 1 Camp. R. 452; *Chapman v. Searle*, 3 Pick. R. 44; *Barrett v. Goddard*, 3 Mason, R. 107.

³ *Hawes v. Watson*, 2 Barn. & Cres. 540; S. C. 4 Dowl. & Ryl. 22; *Harman v. Anderson*, 1 Bos. & Pull. N. R. 69; *Dixon v. Yates*, 5 Barn. & Ald. 313; *Stoveld v. Hughes*, 14 East, R. 308; *Lackington v. Ather-ton*, 7 Mann. & Grang. 360; *Akerman v. Humphery*, 1 Car. R. 53.

But, until he accept the order and agree to hold the goods for the purchaser, or, at least, unless the order is one which he is bound to accept and which is delivered to him, he is the bailee of the seller, and the latter still retains his right of stoppage.¹ Thus, where certain timber, which was deposited in the West India Docks in the name of A, was sold by him to B, but no delivery order was given,—and, subsequently, B contracted to sell the timber to C, who accepted a bill for the amount, B giving him an invoice and a delivery order; but the dock company refused to deliver the timber without an order from A, and C afterwards became bankrupt; it was held that B still retained a right of stoppage.² But the transfer of a delivery order from person to person does not transfer the property sold, so as to destroy the vendor's right of stoppage, until such order is accepted by the wharfinger, or carrier, or bailee, or, at all events, is delivered to him, and is one which he is bound to accept. Thus, if goods be shipped to the buyer, and, before they arrive, he give a delivery order to any purchaser, it will not transfer the property so as to destroy the right of stoppage, before the order is received by the master.³ So, also, the same rule would govern if he should refuse to hold them for the purchaser. But where a delivery order is accepted by the bailee, it is not necessary, if the identity and quantity of the goods be already ascertained, that they should be rehoused, and reweighed or remeasured, in order absolutely to transfer the property in the goods so as to destroy the vendor's right of stoppage.⁴ And such an acceptance by the wharfinger will not only be implied from a transfer in his books, but from the fact of his receiving the order without objection.⁵ Yet, if any

¹ *Jenkins v. Usborne*, 7 Mann. & Grang. 678.

² *Lackington v. Atherton*, 7 Mann. & Grang. 360.

³ *Jenkins v. Usborne*, 7 Mann. & Grang. 678.

⁴ *Tucker v. Ruston*, 2 Car. & Payne, 86.

⁵ *Hammond v. Anderson*, 2 Camp. R. 243; *Lucas v. Dorrien*, 7 Taunt.

thing remain to be done in order to designate the quantity, or identity of the goods sold, the mere handing of a delivery order to the vendee, and the transfer of the goods to him in the warehouseman's book is not sufficient to vest the property in him.¹ Again, such a delivery order should be absolute in its terms, and not conditional; for, if the order intimate a claim by the vendor to hold the goods until the vendee shall have complied with some condition precedent, — as if the order be to deliver them to him as soon as he shall pay or advance a certain portion of the price, — the vendor would retain a right of stoppage over the goods.² Nor would it make any difference in such a case, that the vendee pays warehouse rent to the wharfinger, since this only indicates a change of property which is perfectly consistent with the vendor's right of lien, and of stoppage *in transitu*.³ So, also, if the order be to send the goods to the warehouse of the vendee, it is evident that the warehouseman is thereby made a middleman, and that the right of stoppage remains. Of course, if any thing remains to be done in such cases by the vendor, or the warehouseman, before delivery can be made, as if the goods be to be weighed, or measured, or selected, the property would not pass, and therefore the vendor would necessarily retain his complete authority of owner over them,⁴ and unless that which remain to be done is exceedingly

R. 278; Noble v. Adams, 2 Marsh. R. 366; S. C. 7 Taunt. R. 59; Swanwick v. Sothorn, 9 Adolph. & Ell. 895; S. C. 1 Per. & D. 648.

¹ Swanwick v. Sothorn, 9 Adolph. & Ell. 895.

² Winks v. Hassall, 9 Barn. & Cres. 372; Bloxam v. Sanders, 4 Barn. & Cres. 941; Dodsley v. Varley, 12 Adolph. & Ell. 632.

³ Ibid.; Greaves v. Hepke, 2 Barn. & Ald. 131; Miles v. Gorton, 2 Crompt. & Mees. 504; Townley v. Crump, 4 Adolph. & Ell. 58.

⁴ Withers v. Lyp, 4 Camp. R. 237; S. C. Holt, R. 18; Busk v. Davies, 2 Maule & Selw. 397; Wallace v. Breeds, 13 East, R. 522; Hanson v. Meyer, 6 East, R. 614; Simmons v. Swift, 5 Barn. & Cres. 857; Rugg v. Minett, 11 East, R. 216; Stonard v. Dunkin, 3 Camp. R. 314; Austen v. Craven, 4 Taunt. R. 644; White v. Wilkes, 5 Taunt. R. 176; Shepley v. Davis, 5 Taunt. R. 617. Ante, § 296.

trifling and insignificant, in which case it will not be considered.¹

§ 311. A distinction exists between delivery orders, given for goods in a private warehouse, belonging to some third person, and negotiable dock warrants to receive goods in bonded warehouses. In respect to the latter, the delivery and indorsement of the warrant, is held to be an absolute transfer both of property and possession from the vendor to the vendee.² And, although the warrants have been obtained fraudulently, yet if they be indorsed to a *bonâ fide* vendee, for a valuable consideration, the latter is entitled to possession of them against every one.³

§ 342. The next consideration is in respect to the effect of a *part-delivery* upon the right of stoppage *in transitu*. So long as any portion of the goods remain in the hands of the seller, his right to them, if he have any, is a right of lien, and this we have already considered.⁴ If, however, they be in the hands of a third person, as if a wharfinger or carrier, it would seem that a complete delivery by such person, of part of the goods sold under an entire contract, in compliance with a general order by the vendor, will ordinarily operate to divest the seller of his right of stoppage.⁵ Thus, where a number of bales of bacon, then lying at a wharf, having been sold for one entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to

¹ *Tansley v. Turner*, 2 Bing. N. C. 151.

² *Spear v. Travers*, 4 Camp. R. 251; *Mottram v. Heyer*, 5 Denio, R. 630.

³ *Zwinger v. Samuda*, 7 Taunt. R. 265; *Keyser v. Suse, Gow*, R: 58; *Barton v. Boddington*, 1 Car. & Payne, 207.

⁴ Ante, Ch. ix. § 284 to 291.

⁵ *Slubey v. Hayward*, 2 H. Black. R. 504; *Hammond v. Anderson*, 1 Bos. & Pull. N. R. 69; *Crawshay v. Eades*, 1 Barn. & Cres. 180.

the wharf, weighed the whole, and took away several bales, and then became bankrupt, — and the vendor, within ten days from the sale, ordered the wharfinger not to deliver the remainder; it was held, that the vendee had taken possession of the whole, and that the vendor could not stop the portion which remained in the hands of the wharfinger.¹ But if the circumstances manifest an intention on the part of the seller to distinguish between the part delivered and the remainder, and to retain the latter, his right of stoppage will not be gone.² So, also, where the vendee takes possession of a part with the intention of separating it from the remainder, and not of taking the whole, the *transitus* will not be determined as to the portion left.³ So, also, unless the delivery of a part by the carrier be complete, the vendor will retain his right of stoppage. A delivery by a carrier is not complete, until he actually and entirely parts with the possession; and this he is not bound to do until the freight due to him is tendered or paid; although if he waive such right by a delivery, without payment, he thereby destroys the right of stoppage.⁴ Where, therefore, A delivered a quantity of iron to a carrier to be conveyed to B, the vendee, and the carrier, having reached B's premises, landed a part of the iron on his wharf, and then, finding that B had stopped payment, reloaded the same on board his barge and took the whole of the iron to his own premises; it was held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop *in transitu*, inasmuch as the special property remained in the carrier, until the freight for the whole

¹ Hammond v. Anderson, 1 Bos. & Pull. N. R. 69; Hawes v. Watson, 2 Barn & Cress. 540; Barton v. Boddington, 1 Carr. R. 207.

² Bunney v. Poyntz, 4 Barn. & Adolph. 568; Dixon v. Yates, 5 Barn. & Adolph. 339. These two cases limit the doctrine of the cases cited in the previous note to the rule stated in the text.

³ Tanner v. Scovell, 14 Mees. & Welsb. 28.

⁴ Crawshay v. Eades, 1 Barn. & Cres. 181. See, also, Betts v. Gibbins, 4 Nev. & Man. 61; S. C. 2 Adolph. & Ell. 57.

cargo was tendered, or until he had done some act showing that he assented to part with the possession of the goods without receiving his freight.¹ In the next place, the transit may

¹ *Crawshay v. Eades*, 1 Barn & Cres. 181. In this case Mr. Justice Bayley said: "It is quite clear, that if the iron was once completely delivered to Hornblower, the *transitus* was at an end, and his assignees would be entitled to retain it. It is incumbent on them, however, to show clearly, that such a delivery had been made by the carrier to the vendee, as would deprive the former of his lien; for nothing less than that could take away from the vendor his right to stop *in transitu*. There can be no doubt, that wherever there is a complete delivery of part of one entire cargo to the consignee, the *transitus* is ended, and the consignor cannot stop the remainder. But in this case there was no complete delivery of any part of the iron to Hornblower. The goods were in different barges, and a part of the iron was taken out of each barge and landed upon Hornblower's wharf, but he had not taken possession of it, nor was it weighed, so that the amount of the freight due to Eades might be ascertained. Now, independently of any particular usage, a carrier has, by the Common Law, a right to insist that the goods shall be weighed, in order, first, that it may be ascertained for his own security that he has delivered the precise quantity entrusted to him; and, secondly, that the amount of the freight, if it depend upon the weight, may be ascertained. When part of the iron was landed upon the wharf, it might more properly be considered as in a course of delivery, than as actually delivered. By placing it upon the wharf, the carrier did not mean to assent to Hornblower's taking it away without paying the freight. Besides, a carrier has a lien on the entire cargo, for his whole freight; and until the amount is either tendered or paid, the special property which he has in his character of carrier, does not pass out of him to the vendee, unless, indeed, he does some act to show that he assents to the vendee's taking possession of the property before the freight is paid. It is clear, upon the facts given in evidence at the trial, that the carrier never did assent to Hornblower's taking possession of this property, for he reships the part of the iron that was landed, as soon as he is informed that the freight is not likely to be paid. In order to divest the consignor's right to stop *in transitu*, there ought to be such a delivery to the consignee, as to divest the carrier's lien upon the whole cargo. I am of opinion, therefore, that the entire freight not having been tendered or paid, the delivery in this case was not complete as to any part; that the special property remained in the carrier; and that the consignor was not deprived of his right of stoppage *in transitu*."

be determined before the delivery to the consignee, by some intervening act done by him. And this leads us to the consideration of the proper construction to be given to a bill of lading.

§ 343. Whether a bill of lading, which contains the word "assigns," is of a negotiable nature, so as to pass the possession, without a delivery of the goods, is a question which has been much discussed, and which particularly occupied the attention of the court in the case of *Lickbarrow v. Mason*.¹ The circumstances of that case were as follows. Messrs. Turing and Co., by order of one Freeman, shipped goods to him for Liverpool, drawing bills of exchange upon him for the price, which were subsequently accepted by him, and taking from the master four bills of lading in the usual form for delivery to order or assign, one of which was retained by the consignors, one by the master, and two indorsed by the consignors in blank, and transmitted, together with an invoice, to Freeman at Rotterdam, who received them, and sent them, with the invoice, to the plaintiff's, at Liverpool, in the same state in which he received them, in order that the plaintiff might take possession of the goods, and sell them on his account, he drawing bills of exchange upon them to nearly the amount, which were accepted by them and paid. Between the time of the ship's departure and her arrival at Liverpool, Freeman became a bankrupt, and absconded, and Turing & Co. sent another of the bills of lading to the defendants, indorsed specially for delivery to them, and they thereupon obtained the goods from the master. Turing and Co. afterwards paid the bills of exchange drawn by them on Freeman, and the plaintiffs paid those which had been drawn on them by Freeman; it was held by the court, that, as the plaintiff had paid a valuable consideration for the goods, without fraud, or notice, he was entitled to the goods, — and

¹ 2 T. R. 63; S. C. 6 East, R. 21.

that, as between the vendor and third persons, the delivery of a bill of lading made by the consignee to a third person for a valuable consideration, whether it were indorsed in blank, or to a particular person, was a delivery of the goods themselves so as to deprive the consignor of the right of stoppage. This case was afterwards carried to the Exchequer Chamber on the appeal of the defendant, and Lord Loughborough, in an elaborate opinion, reversed the decision of the King's Bench. The case was then carried to the House of Lords, where the judgment of the Court of King's Bench was affirmed, and a most luminous opinion delivered by Mr. Justice Buller. The case was, however, sent back again to the King's Bench, to be tried by a jury, in order to bring out more fully the facts of the case, — and the court again decided the case, without argument, in conformity with the original decision of the court. Lord Kenyon, who had, in the interval between the two trials, been placed at the head of the court, fully concurring therein. Another writ of error was subsequently brought, but it was abandoned.¹

§ 314. The law, as settled in this case, has always since been adhered to, and may be stated to be, that a bill of lading is negotiable, so as to transfer an absolute right of property to a *bonâ fide* assignee without notice; but that the mere delivery of it to the original vendee does not determine the *transitus*. But, if it be assigned by the original vendee to a third person, for a valuable consideration without notice, the *transitus* is ended, and the right of stoppage is gone.² But a shipping note, or a delivery order, or an invoice, not being negotiable,

¹ See the reports of this case in 2 T. R. 63; 1 H. Black. R. 357; 6 East, R. 17, note; 2 H. Black. R. 211; 5 T. R. 317, 683. See Smith's Leading Cases.

² See, also, Code de Commerce, tit. Revendication; Cuming v. Brown, 1 Camp. R. 101; S. C. 9 East, R. 506; Caldwell v. Ball, 1 T. R. 205; Vertue v. Jewell, 4 Camp. R. 31; Wilmshurst v. Bowker, 7 Mann. & Grang. 883; Walley v. Montgomerie, 3 East, R. 585; Berkley v. Wat-

do not, by mere delivery thereof, change the property, unless the transfer be intended as a symbolic delivery of the property.¹

§ 345. The validity of an assignment to destroy the right of stoppage is not, however, confined to cases where the assignee has no notice that the goods have not actually been paid for; for if the goods be sold on credit, and he take the assignment *bonâ fide*, and under the supposition that they will be fairly and properly paid for when credit has expired, his title cannot be disturbed by the consignor.² If, therefore, a person take an assignment of a bill of lading, knowing that a bill of exchange has been accepted for the price of the goods, and without any reason to suppose that it will be dishonored, the consignor will have no valid claim upon the goods in his hands.³ So, also, although the goods may not be fairly and honestly assignable, yet, if he take them with no suspicion that such is the fact, he acquires thereby a good title against the consignor. And the ground of this rule is, that, where goods come into the hands of a third person, who takes them in good faith, and without notice, and pays for them a valuable consideration, he ought not to suffer merely because the consignor was so incautious as

ling, 7 Adolph. & Ell. 29; Waring v. Cox, 1 Camp. R. 369; Coxe v. Harden, 4 East, R. 211; Humphrey v. Tucker, 4 Bing. R. 516. The same rule obtains in the United States. Griffith v. Ingledew, 6 Serg. & Rawle, 429; Peters v. Ballistier, 3 Pick. R. 495; Walter v. Ross, 2 Wash. C. R. 283; Conard v. Atlantic Ins. Co. 1 Peters, R. 386.

¹ Jenkins v. Usborne, 7 Mann. & Grang. 700. So, also, Ante, § 312; Akerman v. Humphrey, 1 Carr, R. 53; Tucker v. Humphrey, 4 Bing. R. 523.

² Cuming v. Brown, 1 Camp. R. 104; S. C. 9 East, R. 506; Abbott on Shipping, (Shee's ed. p. 479.) See, also, Vertue v. Jewell, 4 Camp. R. 31.

³ Cuming v. Brown, 9 East, R. 106; Abbott on Shipping, (Shee's ed.) p. 479; Cox v. Harden, 4 East, R. 211; Ogle v. Atkinson, 5 Taunt. R. 759; S. C. 1 Marsh. R. 323; Wright v. Campbell, 4 Burr. R. 2046; S. C. 1 W. Black. R. 628; Vertue v. Jewell, 4 Camp. R. 31.

to trust his goods out of his possession without payment, and thereby afford to his consignor an opportunity to mislead and defraud.¹ But, if he take them, knowing that the transaction is fraudulent and dishonest; as, if he know that the consignee is insolvent, and that no bill has been accepted for the price, or can be paid if it be accepted; or if he connive with the consignee in contravening the actual terms of the sale, or the rights of the consignor; he will stand in the same position as the consignee, and his claim will not defeat the consignor's right of stoppage.² Thus, where the consignor of goods, to whom the bill of lading is indorsed in blank, assigns it over to a third person, and, by a subsequent agreement between them, they become partners, the assignee knowing that the consignor has not been paid for them, the assignee cannot prevent the consignor from exercising his right of stoppage *in transitu*.³ So, also, a bill of lading, given before the goods are put on board the ship, is fraudulent, and the indorsement of it will convey no property in the goods, even to a *bonâ fide* indorsee.⁴

§ 346. But, where there is no fraud or connivance of any sort between the assignor and assignee, so complete is the transfer effected by indorsement and delivery of a bill of lading, that a *bonâ fide* assignee may, upon the insolvency of his assignor, to whom they are consigned, exercise the right of stoppage *in transitu* and sue the wharfinger, if he refuse to deliver the goods to the assignee.⁵ A bill of lading, though signed by the master, is not, however, conclusive evidence that

¹ *Salomons v. Nissen*, 2 T. R. 674.

² *Cuming v. Brown*, 9 East, R. 106; *Abbott on Shipping*, (Shee's ed.) p. 479; *Cox v. Harden*, 4 East, R. 211; *Ogle v. Atkinson*, 5 Taunt. R. 759; S. C. 1 Marsh. R. 323; *Wright v. Campbell*, 4 Burr. R. 2046; S. C. 1 W. Black. R. 628; *Vertue v. Jewell*, 4 Camp. R. 31.

³ *Salomons v. Nissen*, 2 T. R. 671.

⁴ *Osey v. Gardner*, Holt, N. P. C. 405.

⁵ *Morrison v. Gray*, 9 Moore, C. R. 484.

the goods therein stated were actually shipped, as between a *bonâ fide* assignee for value, and the ship-owner.¹

§ 347. Again, although the *bonâ fide* assignment of a bill of lading determines absolutely the right of stoppage *in transitu*, yet this same effect does not result from a mere pledging of the bill of lading by the consignee of the goods as a security for a debt. For, in such a case, although the legal right of possession passes to the pledgee, the vendor may yet assert his interest in them, subject to the rights of the pledgee, and will be entitled, at least in Equity, to the residue, after satisfaction of the pledgee's claim, — and, if other goods belonging to the pledgor be pledged at the same time with those in the bill of lading, the vendor will be entitled to have the proceeds of the former applied to the discharge of the pledgee's claim before his own goods are so appropriated.² So, also, if the bill of lading be for delivery to order or assigns, the indorsement of the shipper is, ordinarily, necessary to give it negotiability, and if it be transmitted unindorsed, the holder cannot, by transferring the property in the goods to a third person, divest the right of the consignor to stop them *in transitu*.³ There may, however, be special circumstances, which will be considered as equivalent to an indorsement, in a case of entire good faith, — as, where the indorsement was accidentally omitted by the shipper, but upon application by letter from the consignees, he wrote that the omission was by mistake, and that he would send an indorsement, and the consignees thereupon sold the goods, and upon their subsequent bankruptcy and inability to pay their bills therefor, one Dick paid them, for the honor of the drawers, and, being acquainted with the whole transaction,

¹ Berkley v. Watling, 7 Add. & Ell. 29.

² In the Matter of Westzinthius, and others, 5 Barn. & Adolph. 817; Abbott on Shipping, 485.

³ Nix v. Olive, sit. at Guildhall before Lord Ellenborough, ch. 7, after Trin. Term, cited Abbott on Shipping, 490.

applied to the shipper for the indorsement, which was sent him ; it was held, in an action of *trover* brought by him against the vendees, that, inasmuch as all the parties were cognizant of the circumstances, the transfer was sufficient without the indorsement, and that the plaintiff could not, therefore, take the goods from the possession of the vendees.¹

¹ *Dick v. Lumsden*, Peake's N. P. C. 189.

CHAPTER XII.

OF WARRANTY.

§ 348. THE subject-matter of sale being finally reduced to the possession of the vendee, so as to divest the vendor of any control over them, and the contract of sale being completed, the next question of interest, which naturally presents itself, is as to whether the goods sold are of the quality and nature, which the vendee intended to purchase; and, if they be not, under what circumstances he is entitled to rescind the contract, and reclaim the price. And this leads us directly to the consideration of Express and Implied Warranty; since it is only upon the ground, that the vendor has not complied with his agreement, nor fulfilled his engagements, both express and implied, that the vendee can, at this stage of the contract, found any valid claim to set aside the sale.

§ 349. The first and general rule relating to warranty in cases of sale, is, that the purchaser buys at his own risk, — *caveat emptor*, — unless the seller either give an express warranty; or, unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold; or, unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale.¹ These exceptions to the general rule, we shall consider consecutively.

§ 350. Before proceeding to the consideration of these ex-

¹ Willings v. Consequa, Peters, C. C. R. 301; Holden v. Dakin, 4 Johns. R. 421; Swett v. Colgate, 20 Johns. R. 196; Welsh v. Center, 1 Wend. R. 185; Mixer v. Coburn, 11 Metcalf, R. 559.

ceptions, however, it may be as well to state that it is not necessary, in order to render the vendor liable, that the warranty should proceed from him personally, but that he will be equally bound, if it be made by any one held out by him to be his agent in that behalf, or if it be made in his presence, without denial by him. In this respect, however, there is a distinction between the power of a general agent, and that of a special agent to bind his principal. A general agent is one who is authorized to do all acts connected with a particular business, or transaction, — a special agent is one empowered to do a single act. In respect to the former class, if the agent exceed his special instructions, the principal is not bound, unless he has held him out as possessing a more enlarged authority. But in respect to the latter class, the principal will be bound by all the acts of the agent, done within the general scope of his authority, even although the agent should violate his private instructions.¹ Thus, if a man send his horse to a fair by a *stranger*, instructing him to sell the horse without a warranty, and the stranger nevertheless warrant, the owner will not be bound.² So, also, if a man (not being a horse-dealer) send his servant to market to sell his horse, with private instructions not to warrant it, the master is not bound; for the servant, in both cases, is merely a special agent.³ But, if the servant of a horse-dealer, having a general authority to sell and warrant, do warrant in a particular case, in violation of private instructions, the principal is bound thereby.⁴ It

¹ Story on Contracts, § 284; Story on Agency, § 42, and cases cited; 2 Kent, Comm. Lect. 41, p. 620, 621; Fenn v. Harrison, 3 T. R. 757; Pickering v. Busk, 15 East, R. 45; Helyear v. Hawke, 5 Esp. R. 72; Jeffrey v. Bigelow, 13 Wend. R. 518; Schimmelpennich v. Bayard, 1 Peters, R. 264; Pothier on Oblig., Evans, n. 79; Id. n. 447, 448; Alexander v. Gibson, 2 Camp. R. 555.

² Fenn v. Harrison, 3 T. R. 757, 762; S. C. 4 T. R. 757.

³ Bank of Scotland v. Watson, 1 Dow, R. 45; Strode v. Dyson, 1 Smith, R. 400.

⁴ Pickering v. Busk, 15 East, R. 45; Alexander v. Gibson, 2 Camp. R.

would, however, be incumbent on the vendor in all such cases to prove that his instructions were violated, since he is *primâ facie* liable for the warranty.¹ The warranty of a person merely intrusted to deliver the thing sold to the vendee, is not *primâ facie* binding on the principal, but an express authority must be shown ; and, therefore, where a horse has been sold by A to B, and A's servant, on delivering the horse to B, made certain statements, and signed a receipt for the price of the horse, containing a warranty ; it was held, in an action on the warranty, that A was not bound by the statements of the servant, as no express authority to give the warranty was shown.²

§ 351. Where, however, a principal employs an agent or servant to make a sale for him, whatever such agent says at the time of the sale, as a warranty or representation respecting the thing sold, is evidence against the principal ; but not what he says at a subsequent time ; for a warranty by an agent, in like manner as a warranty by his principal, if made subsequently to the sale, and offering no inducement to it, is wholly without consideration, and cannot be enforced against him.³

§ 352. We now proceed to the consideration of the exceptions to the general maxim of *caveat emptor*. And first, as to what constitutes an express warranty. Any affirmation, made by the vendor at the time of the sale, in relation to the goods sold, is a warranty, if it be intended as such.⁴ But no seller is bound beyond the actual terms of his warranty, and, if it

555; *Bank of Scotland v. Watson*, 1 Dowl. R. 45; *Taylor v. Green*, 8 Car. & Payne, R. 316; *Allen v. Denston*, 8 Car. & Payne, 760.

¹ *Woodlin v. Burford*, 2 Crompt. & Mees. 391.

² *Ibid.* It is held in Alabama that when power is given to an agent to sell a slave, an authority is implied to make to the purchaser a warranty of title and soundness. *Cocke v. Campbell & Smith*, 13 Ala. 286.

³ *Helyear v. Hawke*, 5 Esp. R. 72. See, also, Post, § 355.

⁴ *Pasley v. Freeman*, 3 T. R. 57; *Wood v. Smith*, 4 Car. & Payne, 46.

be restricted and limited, he will only be liable within such restrictions. Where, therefore, a person, at the time of selling a horse, said, "I never warrant, but he is sound, as far as I know," it was held to be a qualified warranty, upon which the purchaser could maintain an action only upon showing that the seller knew, at the time of the sale, that the horse was unsound.¹ So, also, where a warranty was given in the following terms: "Received of A B, (the purchaser,) £10, for a grey four-year old colt, warranted sound in every respect;" it was held, that it was restricted to the soundness of the animal, the age being mere matter of description.² So, also, a bill of sale of a horse on which he is stated as "considered sound," does not import a warrant of soundness.³

§ 353. A party is bound to make good his warranty to the letter, and to its evident intent, whether the quality warranted be material or not, and it is only necessary for the buyer to show that the article does not correspond to the exact terms of the warranty. Thus, where a contract was made for the sale of a certain quantity of "Scott & Co.'s mess pork," and it appeared, by the evidence of mercantile men, that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market; it was held, that the warranty was not satisfied by supplying unmessed pork, which had merely passed through the hands of Scott & Co., as consignors, and which bore their brand mark, but that it meant pork of their manufacture, which was messed.⁴ So, also, where a ship was warranted to be copper-fastened, and it was a part of the contract, that she should be

¹ Wood v. Smith, 5 Mood. & Ry. 124; S. C. 4 Car. & Payne, 45.

² Budd v. Fairmaner, 1 Mood. & Scott, 74; S. C. 8 Bing. R. 48; 5 Carr. & Payne, 78.

³ Burdit v. Burdit, 2 Marsh, R. 143; Towell v. Gatewood, 2 Scamman, R. 22.

⁴ Powell v. Horton, 2 Bing. N. C. 668.

taken "with all faults, without allowance for any defects whatsoever," and she proved to be only partially copper-fastened; it was held, that the vendor was liable on the warranty, notwithstanding that she was to be taken "with all faults,"¹ for that, "with all faults," must have been intended to mean all faults consistent with her being copper-fastened, according to the terms of the warranty. So, also, in another case, it was held, that proof, that a horse was a good drawer, did not satisfy a warranty, that he was "a good drawer and pulls quietly in harness."² Again, if there be an express warranty as to any single point, no implied warranty will be raised beyond its express terms. Where, therefore, upon the sale of hops by sample, a warranty was given, that the bulk of the commodity answered to the sample; it was held, that the seller was not responsible for a latent defect, unknown to him, and arising from the fraud of the grower, but only according to the terms of the warranty.³ So, also, where a large number of barrels of mackerel, branded under the inspection laws as No. 1 and No. 2 mackerel, were sold under a warranty, that they were of such a description; it was held, that the vendor could not be understood to warrant the fish to be free from rust, although it appeared, that mackerel affected by rust are not considered as No. 1 and No. 2, but only to warrant that they were inspected and branded as such.⁴

§ 354. But a general warranty is not understood to extend to patent defects, which are apparent upon careless inspection, or to defects which are at the time known to the buyer.⁵ And

¹ *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Baglehole v. Walters*, 3 Nev. & Man. 752; S. C. 1 Adolph. & Ell. 508.

² *Colthard v. Puncheon*, 2 Dowl. & Ry. 10.

³ *Parkinson v. Lee*, 2 East, R. 314. See, also, *Budd v. Fairmaner*, 8 Bing. R. 52.

⁴ *Winsor v. Lombard*, 18 Pick. R. 61.

⁵ *Dyer v. Hargrave*, 10 Ves. R. 505; *Margetson v. Wright*, 7 Bing. R.

this rule obtains on the ground that the warranty cannot operate as a deceit or false inducement in respect to defects which are perfectly manifest, and also because neither the seller can be presumed to have intended to warrant against them, nor the buyer to have understood him so to do. A party, therefore, who should buy a horse knowing it to be blind, or a house, seeing and knowing it to be without roof or windows, could not on that account recover against the vendor upon a general warranty, that the one was sound, or that the other was in good repair.¹ So, also, if cloth be warranted to be blue, and the vendee see, and know, that it is murrey, he cannot recover therefor on the warranty.² So, also, where, on the sale of a race-horse, the seller told the purchaser that the horse was a crib-biter, and he also had a splint, which was apparent, it was held, that a warranty that the horse was sound, wind and limb, at the time of the sale, did not extend to those defects.³ If, however, the vendee did actually neglect to examine, and were unaware of the defect, or were physically unable to perceive it, from blindness, the seller would be bound to the full extent of his warranty, although the defect were patent.⁴ So, also, where the seller informed the buyer that one of two horses he

605; *Schuyler v. Russ*, 2 Caines, R. 202; *Dana v. Boyd*, 2 J. J. Marsh. R. 587; *Hudgins v. Perry*, 7 Iredell, R. 102. So, also, in the Roman law. Dig. Lib. xviii. tit. 1, art. 43. "Ea quæ commendandi causa in venditionibus dicuntur, si palam appareant venditorem non obligant, veluti si dicat servum speciosum, domum bene ædificatam; at si dixerit hominem literatum, vel artificem, præstare debet, nam hoc ipso pluris vendit." See, also, Dig. Lib. 19, tit. 1, art. 13, § 4.

¹ *Margetson v. Wright*, 7 Bing. R. 605; 8 Bing. R. 454; S. C. 5 Moore & Payne, 600; *Mellish v. Motteaux*, Peake, N. P. R. 115.

² 11 Edward 4, c. 6; Kit. 174, b; *Bayley v. Merrill*, Cro. Jac. 387.

³ *Margetson v. Wright*, 5 Moore & Payne, 600; S. C. 7 Bing. R. 605; 8 Bing. R. 454; 1 M. & Scott, 622.

⁴ *Butterfeild v. Burroughs*, 1 Salk. R. 211; *Viner*, Abr. Actions, a. c. 7, z. b. 15; Bro. Abr. Deceit, pt. 29, citing 11 E. 46; 3 Black. Comm. 465.

was about to sell him, had a cold, but agreed to deliver both at the end of a fortnight sound and free from blemish, and at the end of the fortnight the horses were delivered, but one had a cough, and the other a swelled leg, which was apparent at the time of the sale, and the buyer brought an action for the price, and a verdict was found against him, the court refused to grant a new trial or to disturb the verdict.¹ Of course, if the defect be one requiring a peculiar skill or knowledge to discover, which the vendee has not, the warranty will bind the seller.

§ 355. In all these cases, however, it is only the irresistible presumption from the circumstances, that the vendee knew of the defect, which will absolve the vendor from his warranty therefor. If, therefore, where an express warranty is given, the vendee examine the articles sold, he does not thereby diminish his right to rely solely on the warranty, if the article sold be so disguised that it was difficult to ascertain whether it corresponded to the description, — or if, although it was not difficult, he did not, in fact, perceive that it differed.² Nor, indeed, even if the purchaser have ample opportunity to examine the article sold, and skill to enable him, on examination, to perceive any defect, is he bound to use that skill, or to make such examination, — he may rely on the express warranty of the seller.³ And if he do examine the article minutely at the time of the sale, his examination will never be construed as a waiver of his right to hold the seller to his warranty. Thus, where the defendant warranted an article which he sold at auction to be “Manilla Indigo,” and on the day of the sale, the article was examined by the plaintiff, who was a druggist, it was held,

¹ *Liddard v. Kain*, 9 Moore, R. 356; S. C. 2 Bing. R. 183.

² *Henshaw v. Robins*, 9 Metcalf, R. 89; *Tye v. Fynmore*, 3 Camp. R. 462; *Bradford v. Manly*, 13 Mass. R. 139; *Shepherd v. Kain*, 5 Barn. & Ald. 290.

³ *Ibid.*

that the seller was liable on the warranty, the article sold having proved to be merely prussian blue, chromate of iron and potash, so skillfully compounded as to deceive experts.¹

§ 356. A warranty to be binding must be made by the vendor, either before the sale, and with a direct reference to it, or at the time of it; for, if it be made after the sale, it is wholly without consideration, and, as it forms no part of the inducement to the contract, the buyer is not misled by it, and it is, therefore, void.² Thus, where A exchanged a horse with B for a mare and £10, and B on the following day sent his servant with the £10 to A, and A, at the request of the servant gave the following receipt, "Received of the defendant £10 for a colt, warranted sound in every respect," it was held, that this receipt being given after the sale, and not in compliance with any previous promise, A was not liable thereon.³

§ 357. It is not necessary, in order to constitute a warranty, that the vendee should use the word "warrant," or "warranty." Any positive affirmation or representation made by the vendor at the time of the sale, with respect to the subject of sale, which operates or may operate as inducement thereto, unless it be the expression of a mere matter of opinion in a case where the vendee had no right to rely upon it, or be purely matter of description or identification, without fraud, and not intended as a warranty, constitutes a warranty.⁴ Thus, if the seller ver-

¹ *Henshaw v. Robins*, 8 Law Reporter, 75; Sup. Judicial Court, Massachusetts, March, 1845.

² *Burdit v. Burdit*, 2 Marsh. R. 143; *Budd v. Fairmaner*, 8 Bing. R. 48; S. C. 5 Carr. & Payne, 78; *Hogins v. Plympton*, 11 Pick. R. 97; *Pope v. Lewins*, Cro. Jac. 630.

³ *Budd v. Fairmaner*, 8 Bing. R. 48; S. C. 1 Mood. & Scott, 74; *Liddard v. Kain*, 2 Bing. R. 183; S. C. 9 Moore, R. 356.

⁴ *Jones v. Bright*, 5 Bing. R. 535; *Roberts v. Morgan*, 2 Cowen, R. 438; *Cave v. Coleman*, 3 Mood. & Ry. 2; *Button v. Corder*, 7 Taunt. R.

bally represent to the buyer of a horse, in the course of making the bargain, that he "may depend upon it, the horse is per-

405 ; S. C. 1 Moore, R. 109 ; *Freeman v. Pasley*, 1 T. R. 58 ; *Medina v. Stoughton*, 1 Salk. R. 210 ; *Oneida Manuf. Co. v. Lawrence*, 4 Cowen, R. 440 ; *Roberts v. Morgan*, 2 Cow. R. 438 ; *Chapman v. March*, 19 Johns. R. 290 ; *Whitney v. Sutton*, 10 Wend. R. 411 ; *Carley v. Wilkins*, 6 Barb. Sup. Ct. R. 557. In the case of *Henshaw v. Robins*, 9 Metcalf, R. 88, Mr. Justice Wilde says, "To create an express warranty, the word warrant need not be used, nor is any precise form of expression necessary ; but every affirmation, at the time of the sale of personal chattels amounts to a warranty. This seems to be now settled, notwithstanding the old case of *Chandlor v. Lopus*, Cro. Jac. 4, as to the sale of a bezoar stone, to the contrary. It was so decided in *Osgood v. Lewis*, and *Borrekins v. Bevan*, already cited, and in *Power v. Barham*, 4 Adolph. & Ellis, 473 ; in *Shepherd v. Kain*, 5 Barn. & Ald. 240 ; and in *Freeman v. Baker*, 2 Nev. & Man. 446. And even in New York, where, in other respects, the doctrine in *Chandlor v. Lopus* is adhered to, it has been held, nevertheless, that any representation of the thing sold, or direct affirmation of its quality and condition, showing an intention to warrant, is sufficient to amount to an express warranty. It was so decided in *Chapman v. March*, 19 Johns. 290, and in *Swett v. Colgan*, 20 Johns. R. 196. To the rule of construction laid down in these cases, it was objected by Chief Justice Gibson, who delivered a dissenting opinion in *Borrekins v. Bevan*, that such a principle would extend to loose conversations between the vendor and vendee, in which the vendor may praise his goods, or express any opinion as to their qualities. But it is quite clear, I apprehend, that no such conversations or opinions would or could be construed as amounting to a warranty. No expression of an opinion, however strong, would import a warranty. But if the vendor, at the time of the sale, affirms a fact as to the essential qualities of his goods, in clear and definite language, and the purchaser buys on the faith of such affirmation, that, we think, is an express warranty." In *Morrill v. Wallace*, 9 N. Hamp. R. 111, Mr. Justice Parker, after commenting on the cases, says, "We think that the matter does not depend upon the question whether it was a representation or not, or whether the vendor intended to be bound by a warranty or not, nor upon any particular form of words ; but upon the question whether the vendor made any assertion or affirmation respecting the kind, quality, or condition of the article, or whether there was merely an expression of judgment, opinion, or belief. If the vendor made an assertion of that nature, upon which he intended the vendee should rely, and upon which he did rely, that is sufficient. *Doffee v. Mason*, 8 Cowen, 25 ;

fectly quiet and free from vice," it is a warranty, that the horse is so.¹ So, also, a representation made by a vendor, upon a sale of flour in barrels, that it is in quality superfine, or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the purchaser's agent, that he may rely upon such representation, is a warranty of the quality of the flour.² So, also, if the seller barely affirm that a chattel is his own, he warrants his title.³ Indeed, as we shall hereafter see,⁴ the mere fact that a person sells a thing, of itself constitutes a warranty that it is his property.

§ 357 *a*. It is not necessary that a warranty should be made directly to the vendee, for if the representation have been previously made by the vendor to another person in respect to the property sold, and that representation be known by the vendor to constitute the basis of a subsequent sale made by him to a third person to whom it is communicated, it would have the

12 East, 637. An affirmation of an independent fact, made during a negotiation for a sale; as, for instance, a declaration that another person had offered a particular sum, is not to be regarded as a warranty. 2 Kent's Comm. 381; *Davis v. Meeker*, 5 Johns. R. 354.

"It is well settled that there is no particular form of words necessary to constitute a warranty." 19 Johns. 290; 2 Cow. 438; 4 Cow. 440; 8 Cow. 25; 10 Wend. 413; 13 Wend. 278; 3 Vermont Rep. 53. "I promise" that the matter is so, in as well as if the words were, "I will warrant that it is so." 19 Johns. 290. And so if any other words of affirmation are used in such a manner as to show that the party expects or desires the other to rely upon the assertion, as a matter of fact, instead of taking it as an expression of the judgment or opinion of the vendor, it amounts to the same thing.

"There is nothing magical, nor necessarily any thing technical, about a warranty."

¹ *Cave v. Coleman*, 3 Mood. & Ry. 2.

² *Carley v. Wilkins*, 6 Barb. Sup. Ct. R. 557.

³ *Freeman v. Pasley*, 7 T. R. 58; *Medina v. Stoughton*, 1 Salk. R. 210; S. C. 1 Ld. Raym. R. 523; *Whitney v. Sutton*, 10 Wend. R. 413; *Adamson v. Jarvis*, 12 Moore, R. 241; *Wood v. Smith*, 5 Mood. & Ryan, 121.

⁴ Post, § 367.

same effect as if it were made directly to the vendee.¹ So, also, where the defendant executed to the plaintiff a written assignment in these words: "I hereby assign to Reuben R. Thrall a note in my favor against Theodore Woodward and John H. Philips, dated 13th November, 1838, for one hundred and fifty dollars," &c. And it was held, that such instrument, in describing the property assigned as "a note," must be construed as an express warranty on the part of the defendant, that it was a valid note, and that the signers were of sufficient capacity to contract when they executed it.²

§ 358. Whether mere words of description contained in a bill of parcels, or receipt, or other written memorandum of a sale, constitute an express warranty, seems to be somewhat a matter of doubt, and the cases cannot easily be reconciled. Where there is an express warranty contained therein, and coupled with a description of the goods sold, it has been held, that, if the buyer afterwards discover a latent defect, preventing the article from answering to the description, but not violating the warranty, he must show that the description was false, within the knowledge of the seller, in order to entitle him to recover. Thus, where a receipt was given in the following terms; "Received of A B £10, for a grey four-year old colt, warranted sound in every respect;" it was held, that, as far as regarded the descriptive portion of the receipt, the buyer was bound to prove wilful misrepresentation, or he could not recover,—and that it was not covered by the warranty.³ But, where the bill of parcels, or receipt, or written

¹ Crocker v. Lewis, 3 Sumner, 8. See, also, Barden v. Keverberg, 2 Mees. & Welsb. 63, 64.

² Thrall v. Newell, Verm. 19; (Wush. 4,) 202.

³ Budd v. Fairmaner, 8 Bing. R. 51. "In this case," Tindal, C. J., said, "a written instrument was produced by the plaintiff to show the nature of the contract between him and the defendant, and we are to interpret that instrument like all others, according to the intention of the parties. The

memorandum contains no express warranty in terms, but only a description of the goods sold; it has been held, that the description itself may create a warranty on the part of the seller that the goods answered to the description, and, if they prove not to correspond thereto, the buyer is entitled to recover

instrument appears to be a receipt for 10*l.*, ‘for a grey four-year old colt, warranted sound.’ I should say that, upon this face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to show that the article is not according to the warranty; whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the *scienter*, and show that the description was false within the knowledge of the seller. And where there is an express warranty as to any single point, the law does not, beyond that, raise an implied warranty that the commodity sold shall be also merchantable. Therefore, in *Parkinson v. Lee*, 2 East, R. 313, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect, unknown to him, but arising from the fraud of the grower from whom he purchased. A party who makes a simple representation stands, therefore, in a very different situation from a party who gives a warranty. And, if so, how can I say that this distinction was not present to the mind of the defendant in this case? When he sells a grey four-year old colt, warranted sound, he means to say that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shown to be false within his knowledge. Many cases have been referred to, and some stress has been laid on the effect of the word *dedi* when contained in a grant; but, according to Lord Eldon, in *Browning v. Wright*, 2 B. & P. 21, words of that nature ‘import a contract in law, the effect and meaning of which would be affected by the subsequent words of the indenture;’ and in the cases relied on for the plaintiff, the sellers had delivered commodities essentially different from those which they had professed to sell.” It will be observed, that this case is purely one of interpretation, and the doctrine as to description would seem to be intended to be confined to cases where there is a distinction made by the parties between the description and the warranty, like that which was before the Court. The ground of the Court will be more evident from the

without proof of fraud.¹ This apparent want of harmony between the cases may, however, perhaps be reconciled by the distinction, that, where there is an express warranty in the memorandum, as to a particular quality, it constitutes an implied exclusion of warranty as to every other quality, — *Expressio unius est exclusio alterius*, — and must be construed strictly according to its terms. But, where there is no express warranty in terms in the memorandum, the description, of itself, constitutes an affirmation that the goods correspond thereto, and a warranty to such effect may, therefore, be created on the part of the seller. But, whether the description in the memorandum, of itself, creates a warranty by implication of law, — or whether it is a question of fact, to be taken in connection with the other circumstances, for a jury to determine, is not by

opinion of Mr. Justice Bosanquet and Mr. Justice Alderson, when both treat the case as proceeding upon a manifest intention on the part of the vendor, as expressed in the memorandum, to distinguish between what he was willing to warrant, and what was mere description. The former says: "In every case where the contract appears on a written instrument, the instrument must be construed according to the intent of the parties. As, where the dealing is by a contract note, the article delivered must agree with the terms of the note; or, where a ship is insured, it must correspond with the warranties contained in the policy. What is the instrument here? Not a contract of sale, but a mere receipt, describing an antecedent contract. Are we to infer from the terms used, that the party had expressly contracted the animal should be four years old? The collocation of the word *warranted* shows that such was not the intention of the parties. *Richardson v. Brown* proceeded on this principle, and *Dickinson v. Gapp* is almost the same case as the present. Interpreting this instrument, therefore, according to the intention of the parties, I think it clear that the warranty was confined to soundness." See, also, *Richardson v. Brown*, 1 Bing. R. 344; *Dickinson v. Gapp*, cited 8 Bing. R. 50.

¹ *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Winsor v. Lombard*, 18 Pick. R. 60; *Hogans v. Plympton*, 11 Pick. R. 99; *Power v. Barham*, 6 Nev. & Mann. 62; *S. C.* 4 Adolph. & Ell. 473; 7 Car. & Payne, 356; *Hastings v. Lovering*, 2 Pick. R. 214.

any means clear.¹ It has been held that the setting down the name of an artist in a catalogue of sale, as the painter of a particular picture, did not constitute such a warranty as to entitle the purchaser to an action against the seller, in case the picture were not painted by such artist; on the ground that such a description could only be the result of opinion, — and that, therefore, fraud should be proved on the part of the seller in order to entitle the buyer to recover.² So, also, where a bill of parcels was given for “Four pictures, Views in Venice, Canaletto,” and no express warranty was attached; it was held, that it was a question for a jury to determine, in view of all the circumstances of the case, whether the defendant had contracted that the pictures were painted by Canaletto, or whether the artist’s name had been used merely as matter of description or intimation of opinion.³ It was, however, held in another

¹ *Power v. Barham*, 6 Nev. & Mann. 62; S. C. 7 Car. & Payne, 356; *Lomi v. Tucker*, 4 Car. & Payne, 15; *Hill v. Gray*, 1 Stark. R. 434; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343.

² *Jendwine v. Slade*, 2 Esp. R. 573. In this case, Lord Kenyon said: “It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action, in its present shape, must go on the ground of some fraud in the sale. But, if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase.” This case, it will be seen, proceeds entirely on the ground that the description, from the nature of the case, could be one of mere opinion only.

³ *Power v. Barham*, 6 Nev. & Man. 62; S. C. 7 Car. & Payne, 356; 4 Adolph. & Ell. 476. In this case, Lord Denman said: “I think that the case was correctly left to the jury. We must take the learned Judge to have stated to them that the language of Lord Kenyon in *Jendwine v. Slade*, was merely the intimation of his opinion upon such a contract as was then

case where a ship, described in the advertisement as "copper-fastened," proved to be only partially copper-fastened, that the seller was bound to make good his advertisement, although the ship was sold, "to be taken with all faults, without allowance for any defects whatsoever;" on the ground that "the meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have."¹ So, also, where a sale note was given in the following words, "Sold A 2,000 gallons prime quality winter oil;" it was held, that it constituted a warranty, that the article sold corresponded to the description.² The distinction between these cases seems

before him. It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord Kenyon in the case referred to. But the case here is that pictures are sold with a bill of parcels, containing the words 'Four pictures, Views in Venice, Canaletto.' Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion. I think that their finding was right; Canaletto is not a very old painter. But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence." See, also, *Lomi v. Tucker*, 4 Car. & Payne, 15; *Hill v. Gray*, 1 Stark. R. 434; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343.

¹ *Shepherd v. Kain*, 5 Barn. & Ald. 240. The Court in this case said: "The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold 'with all faults,' and it turns out to be plated; can there be any doubt that the vendor would be liable? 'With all faults' must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all; and, therefore, the verdict was right."

² *Winsor v. Lombard*, 18 Pick. R. 60. See, also, *Hogans v. Plympton*, 11 Pick. R. 99; *Hastings v. Lovering*, 2 Pick. R. 14; and *Henshaw v. Robins*, 9 Metcalf, R. 88. In *Winsor v. Lombard*, Mr. Chief Justice Shaw said: "The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud, by a wilful misrepresentation, the maxim, *caveat emptor*, applies.

to be that where the description relates to a matter of opinion or judgment, in respect to which there can be no certain knowledge, from the nature of the thing, as in respect to the authorship of old pictures, it is a question for a jury to determine, whether the description were intended as a warranty, or as an expression of opinion merely. If it were intended as a warranty, the seller must abide by it; if it were intended solely as a matter of opinion, and so understood by the buyer, the seller is not bound by it, unless he wilfully deceived the buyer.¹ But, where the description is in respect to a matter of fact, relating to the identity or quality of the subject of sale, which is susceptible of accurate and certain knowledge, and especially if it be a matter which the seller is bound to know, before he affirms it to be of a particular quality, a description in the bill of parcels would be considered as an express warranty that the article

Without going at large into the doctrine upon this subject, or attempting to reconcile all the cases, which would certainly be very difficult, it may be sufficient to say that, in this Commonwealth, the law has undergone some modification, and it is now held, that, without express warranty or actual fraud, every person, who sells goods of a certain denomination or description, undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality thus expressed in the contract of sale. Indeed, this rule seems to be now well settled in England." The doctrine is now firmly established in Massachusetts, that a description in a bill of sale constitutes a warranty. See, also, *Morrill v. Wallace*, 9 N. Hamp. R. 111; *Borrekens v. Bevan*, 3 Rawle, R. 23; *Goss v. Turner*, 21 Vermt. (6 Washb.) R. 437; *Richmond Trading Co. v. Farquar*, 8 Blackf. R. 89. But see *Carley v. Wilkins*, 6 Barb. S. C. R. 563; *Scixas v. Woods*, 2 Cowen, R. 48; *Swett v. Colgan*, 20 Johns. R. 96; *Fraley v. Bispham*, 10 Barr, R. 320, where the opposite doctrine is held.

¹ *Budd v. Fairmaner*, 8 Bing. R. 51; *Power v. Barham*, 6 Nev. & Man. 62; S. C. 4 Adolph. & Ell. 476; *Lomi v. Tucker*, 4 Car. & Payne, 15; *Hill v. Gray*, 1 Stark. R. 434; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343; *Hough v. Richardson*, 3 Story, R. 690; *Shepherd v. Kain*, 5 Barn. & Ald. 240; *Winsor v. Lombard*, 18 Pick. R. 60; *Jendwine v. Slade*, 2 Esp. 573.

was such as it was therein described.¹ All the cases, where the rule is asserted that the question was for a jury, have been cases where *pictures* were sold as being the production of a certain artist, in respect to which the description was necessarily a mere statement of opinion, sometimes set forth in a bill of parcels or catalogue,² and sometimes merely verbally stated.³ Where the description is *necessarily* dependent on opinion, — as in the case of an *old* picture, — it must be taken as one of mere opinion, unless it be connected with words of warranty, — and it is not to be presumed to be a warranty of itself; because no intention is presumable from such facts, that the seller was willing to warrant, or that the buyer understood him so to do. In such a case, therefore, the buyer should protect himself by proof, that the description was intended to be given, and was received, as a warranty, — or that the opinion was falsely expressed, so that it was fraudulent. But, where the description is not necessarily dependent on opinion, but is within the knowledge, or the duty, or power of knowledge of the seller, his description is to be taken as an affirmation of fact, and not of opinion, unless it be expressly limited to opinion. Thus, if a person undertake to describe an article as “prime winter oil,” he is bound to make his description good; because he can ascertain whether it is “prime winter oil,” or not. The question is one of fact, which he is bound to know, and which he can know, if he chooses; and, if he neglect to ascertain the fact, and thereby mislead the purchaser, he ought to be liable therefor. So, also, if a person describe a *new* picture as by a particular artist, he ought to be bound as by a warranty, for

¹ See, also, *Bridge v. Wain*, 1 Stark. R. 504; *Yeates v. Pym*, 2 Marsh. R. 141; *Gardiner v. Gray*, 4 Camp. R. 144; *Okell v. Smith*, 1 Stark. R. 108.

² *Jendwine v. Slade*, 2 Esp. R. 573; *Power v. Barham*, 4 Ad. & Ell. 476.

³ *Lomi v. Tucker*, 4 Car. & Payne, 15; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343; and *Hill v. Gray*, 1 Stark. R. 434.

that fact can be ascertained by him, and does not depend solely or necessarily on opinion.¹ But the case of an *old* picture, where the painter has for a long time been dead, is different.

§ 358 *a*. But where a bill of parcels is given, it will be strictly construed, and if it contain no description of the quality of the article sold, a warranty will not be implied that it is of a particular quality, or adapted to a specific use, in extension of the terms of the bill of parcels.² Parol evidence is however admissible to show that custom has affixed a peculiar meaning to certain terms used in a bill of parcels. Thus, where a bill of sale was made of "winter strained lamp oil," it was held that evidence was admissible to show that by this phrase dealers in oil understood *sperm* lamp oil, and not *whale* lamp oil; but evidence also was admitted to show that the parties did not so understand the term used in the bill of sale.³

§ 359. The tendency of all the modern cases on warranty, is to enlarge the responsibility of the seller, to construe every affirmation by him to be a warranty, and frequently to imply a warranty on his part from acts and circumstances, wherever they were relied upon by the buyer. The maxim of *caveat emptor* seems gradually to be restricted in its operation, and limited in its domain, and beset with the circumvallations of the modern doctrine of implied warranty, until it can no longer claim the empire over the law of sales, and is but a shadow of itself. Of course, if there be any fraud, or gross mistake,

¹ *Power v. Barham*, 4 Adolph. & Ell. 476. See, also, *Shepherd v. Kain*, 5 Barn & Ald. 240; *Winsor v. Lombard*, 18 Pick. R. 60; *Hogans v. Plympton*, 11 Pick. R. 99; *Morrill v. Wallace*, 9 N. Hamp. R. 115; *Borrekins v. Bevan*, 3 Rawle, R. 23; *Story on Contracts*, § 828 *a*, § 828 *b*. But see *Seixas v. Wood*, 2 Caines, R. 48; *Swett v. Colgan*, 20 Johns. R. 196.

² *Lamb v. Crafts*, 12 Metcalf, R. 214.

³ *Hart v. Hammett*, 18 Vermt. (3 Washburn, R.) 129.

in the case, the contract of sale would be thereby completely annulled.¹

§ 360. Where there is no written memorandum, or bill of parcels, or sale note, or other description of the goods sold, in writing, the mere expression of opinion as to their value or quality, when made *bonâ fide*; ² or the simple commendation of them; or vague assertions as to their worth; are not treated as warranties. *Simplex commendatio non obligat*. And the ground of this rule is, that, however reprehensible, it is a common trick in trade, for sellers to attach exaggerated value to their goods, and to trumpet forth their excellence, and exhibit them to their best advantage; yet the buyer has only his own folly to complain of, if he trust to boastful and extravagant talk. Besides, the buyer may, if he choose, test the truth of the seller's statement, and secure himself from all loss, by requiring a warranty; and, if he do not, the law throws upon him the burden of his neglect. If, therefore, in the loose talk, which precedes a bargain, the seller make affirmations, the correctness of which the buyer might, by the exercise of ordinary diligence, have tested, the seller is not bound thereby as a warranty.³ If, however, a vendor, while the parties are in treaty for a sale, offers to warrant an article, and the contract

¹ Ante, § 141 to 182; *Seward v. Coesvelt*, 1 Car. & Payne, 23; Post, § . See, also, *Loomis v. Cromwell*, 8 Law Reporter, 546, tried before the Court of Common Pleas, N. York, February, 1846.

² *Morrill v. Wallace*, 9 N. Hamp. R. 111; *Ricks v. Dillahunty*, 8 Porter, R. 103; *Baum v. Stevens*, 2 Iredell, R. 411; *Foggart v. Blackwiller*, 4 Iredell, R. 238; *Henshaw v. Robins*, 9 Metcalf, R. 88.

³ *Chandeler v. Lopus*, Cro. Jac. 4; *Jendwine v. Slade*, 2 Esp. R. 272; *Power v. Barham*, 4 Adolph. & Ell. 473; S. C. 1 Mood. & Rob. 507; *De Sewhanberg v. Buchanan*, 5 Car. & Payne, 343; *Freeman v. Baker*, 2 Nev. & Man. 466; 1 Story, Eq. Jurisp. § 199, 200, 201; *Lomi v. Tucker*, 4 Car. & Payne, 15; *Dyer v. Hargrave*, 10 Ves. R. 505; 1 Roll. Abr. 101 pt. 6; *Vernon v. Keys*, 12 East, R. 632; *Foster v. Estate of Caldwell*, 18 Vermt. (3 Washburn,) R. 176. Post, 360 b.

be not reduced to writing, the warranty will be binding, although the sale do not take place until some days afterwards.¹ But whatever statements or representations are made in the course of conversation, leading to a bargain of sale, yet, if the contract of sale be afterwards reduced to writing, the vendor is only bound by the terms and statements therein contained, (unless in cases of fraud,) for that is the best evidence of the actual terms of the agreement, — all the previous conversations and negotiations being considered as merged therein.² If, therefore, a written contract of sale contain an express warranty as to particular qualities, the liability of the seller in an action on the contract, is limited to such qualities. So, also, if the contract contain no warranty, the buyers cannot, in an action of assumpsit, set up a parol warranty, made at the time of the sale.³ But, if there be a fraudulent representation by the vendor, going to the essence of the contract, — and on the faith of which the contract is made, the vendee may, by an action on the case, or by a bill in Equity, recover upon proof of such representations, although they be not embodied in the written contract.⁴

§ 360 *a*. But a statement of belief or opinion although it is not valid as a warranty, will, if it be made with a knowledge of its falseness, and intended to deceive the purchaser, be treated

¹ *Wilmot v. Hurd*, 11 Wend. R. 584.

² *Bayard v. Malcolm*, 1 Johns. R. 461, 467; *Mumford v. McPherson*, 1 Johns. R. 414; 5 Viner, Abr. 515, pt. 18, 517, pt. 26; *Wilson v. Marsh*, Johns. R. 503; *Clark v. Crandall*, 3 Barb. Sup. Ct. R. 614.

³ *Mumford v. McPherson*, 1 Johns. R. 414; *Pickering v. Dowson*, 4 Taunt. R. 779.

⁴ *Bayard v. Malcolm*, 1 Johns. R. 461, 467; *Dobel v. Stevens*, 5 Dowl. & Ryl. 490; 3 Barn. & Cres. 623; *Mumford v. McPherson*, 1 Johns. R. 414; *Levy v. Langridge*, 4 Mees. & Welsb. 337; *Stevens v. Webb*, 7 Car. & Payne, 60; *Daniel v. Michell*, 1 Story, R. 172; *Hough v. Richardson*, 3 Story, R. 690; *Doggett v. Emerson*, 3 Story, R. 733; *Small v. Atwood*, 1 Younge, R. 407, 459.

as a fraud in equity, and will vitiate the contract if it operated materially to injure the purchaser.¹

§ 360 *b*. Where goods are advertised, and vague general representations of their value are made, and their advantages are boastfully set forth, such statements are not considered as creating warranties, on the ground that they are not intended to be wholly relied upon, and as the goods are open to the examination of the buyer he has ample opportunity to exercise his judgment, or to demand a warranty.²

§ 361. If an express warranty be couched in technical terms, it is to be interpreted according to their technical signification, unless they be manifestly used in a different sense, and differently understood by the buyer.³ What the intention of the parties is depends often upon the usage, and custom, and is a question for the determination of a jury.⁴ Thus, upon a warranty that a horse is "sound," the actual understanding of the parties is in a great measure dependent upon the custom and usage, as well as upon the peculiar circumstances of the case.⁵

§ 362. It may be as well to enumerate here the result of various decisions as to the meaning of the term "sound" in the warranty of a horse, although, in every case, the question is one for the jury. Roaring,⁶ unless it be shown to proceed from

¹ See ante, § 169, 169 *a*, 170, and cases cited.

² *Anderson v. Hill*, 1 *Smede & Marsh*. 679; *Hawkins*, 6 *Campbell*, 1 *Eng. R.* 513.

³ *Hutchinson v. Bowker*, 5 *Mees. & Welsb.* 535; *Hart v. Hammett*, 18 *Vermt.* (3 *Washburn*,) *R.* 127.

⁴ *Lewis v. Peake*, 7 *Taunt. R.* 153; *Atterbury v. Fairmaner*, 8 *Moore, R.* 32.

⁵ *Jones v. Bowden*, 4 *Taunt. R.* 847, 853; *Button v. Corder*, 7 *Taunt. R.* 405; *Cook v. Moseley*, 12 *Wend. R.* 277.

⁶ *Bassett v. Collis*, 2 *Camp. R.* 523.

some disease or organic defect, or unless the horse be thereby rendered less serviceable permanently,¹ does not constitute unsoundness. A slight disorder at the time of the sale, not calculated permanently to diminish the usefulness of the animal, is not unsoundness.² A temporary injury from an accident is not unsoundness.³ Crib-biting is not such an unsoundness as to entitle a purchaser to recover under a general warranty, unless it has produced disease or alteration of structure ; but it is a vice, under a warranty, that a horse is “free from vice.”⁴ A nerved horse is unsound.⁵ So, also, is a horse affected with strangle, or “*mort du chien*,” or “bone spavin of the hock,” or a cough, — unless it be proved to be of a temporary nature.⁶ But mere badness of shape, or defective formation, which has not produced lameness at the time of the sale, is not unsoundness.⁷ Whether a splint constitutes unsoundness depends upon its situation, and whether it would create future lameness.⁸ “Goggles” in sheep also constitutes unsoundness.⁹

§ 363. A vendor is not liable beyond the terms of his express warranty, and where a warranty limited in point of time is given, — as if the seller undertake to warrant against all defects for a certain space of time, or provided the article be returned, or notice be given of a defect within a certain limit, the seller is only bound for such space of time, and

¹ *Onslow v. Eames*, 2 Stark. R. 81.

² *Bolden v. Brogden*, 2 Mood. & Rob. 113.

³ *Garment v. Barrs*, 2 Esp. R. 673.

⁴ *Broennenburgh v. Haycock*, Holt’s N. P. R. 630 ; *Scholefield v. Robb*, 2 Mood. & Rob. 210.

⁵ *Best v. Osborne*, Ryan & Mood. 290 ; S. C. 2 Car. & Payne, 74.

⁶ *Best v. Osborne*, 2 Car. & Payne, 74 ; *Watson v. Denton*, 7 Car. & Payne, 85 ; *Shillitoe v. Claridge*, 2 Chitty, R. 425 ; *King v. Price*, 2 Chitty, R. 416 ; *Coates v. Stephens*, 2 Mood. & Rob. 157.

⁷ *Brown v. Elkington*, 8 Mees. & Welsb. 132.

⁸ *Margetson v. Wright*, 8 Bing. R. 454 ; S. C. 1 Mood. & Scott, 622.

⁹ *Joliff v. Bendell*, Ryan & Mood. 136.

within the terms of his warranty. Thus, where a horse was sold at a repository, and warranted sound, and a rule or condition of sales was affixed to the wall of the repository, stating that "a warranty of soundness, when given at this repository, will remain in force until 12 o'clock, at noon, on the day next after the day of sale, when it will become complete, and the responsibility of the seller will terminate, — unless, in the mean time, a notice to the contrary, &c.," be given, and the horse proved unsound, — the unsoundness being of a nature not likely to be easily discovered, — but no complaint was made until after twelve o'clock on the next day; it was held, that the seller could only be understood to warrant against such defects as the purchaser should discover within twenty-four hours, and that he was, therefore, not liable.¹

§ 363 *a*. Where an article is sold, with a warranty, or a representation amounting to a warranty, as to its quality; and, in an action by the seller to recover the price, the buyer relies upon a breach of the warranty, or the falsity of the representation to reduce the amount of his liability; the burden of proof is on him to show that the quality of the article does not correspond with the warranty or representation.²

§ 364. We now come to the second exception to the maxim, "*caveat emptor*," which obtains in all cases where the law implies a warranty from the circumstances of the case, or from the nature of the thing sold. There is scarcely a subject in the law of sales, in which there is so much apparent confusion among the cases, and so little that is, at first sight, definite and clear in principle. This perplexity is occasioned by the fact, that all of the earlier cases of implied warranty were

¹ Bywater *v.* Richardson, 1 Adolph. & Ell. 508; S. C. 3 Nev. & Man. 752.

² Dorr *v.* Fisher, 1 Cushing, 271.

decided upon questions of pleading, and not on the merits of the case. The old form of declaring upon a warranty, whether it were express or implied, was in *tort*, and the gist of the action was, therefore, the fraud or deceit of the vendor. But there was this great difference between an action in *tort* on an express warranty and on an implied warranty, both in respect to the declaration, and to the proof, — that, in the former case, it was unnecessary to charge fraud in the declaration, — and, if it were charged, it was unnecessary to prove it, otherwise than by showing the warranty to be broken. But in an action in *tort* on an implied warranty, it was incumbent on the plaintiff, not only expressly to charge fraud and deceit in the declaration but also to make actual proof thereof.¹ In other words, in the old form of action, fraud in the one case was presumed from the fact, that the warranty was not complied with, while, in the other case, it was required to be charged, and to be proved. Thus, where, in an action on the case, the defendant affirmed a certain stone, which he sold to the plaintiff, to be a bezoar stone, without an express warranty, when, in fact, it was not, and no allegation was made in the declaration that the seller knew the representation to be false, it was held that there was no cause of action because no fraud was alleged.² But where the declaration averred that the vendor sold two hundred sheep *falso et deceptivo*, affirming them to be his own sheep, *ubi revera* they were the sheep of F. G.; it was held, although there was no express warranty, that the plaintiff

¹ Dale's case, Cro. Eliz. 44; Chandler v. Lopus, Cro. Jac. 4; Furnis v. Leicester, Cro. Jac. 471; Springwell v. Allen, Alleyn, R. 91; S. C. 2 East, R. 449, n.; Dowding v. Mortimer, 2 East, R. 450; Steuart v. Wilkins, Doug. 18; Mumford v. McPherson, 1 Johns. R. 414; Gresham v. Postan, 2 Car. & Payne, 540, n.; Williamson v. Allison, 2 East, R. 446; Bayard v. Malcolm, 1 Johns. R. 453; Harvey v. Young, Yelv. R. 21; Perry v. Aaron, 1 Johns. R. 129.

² Chandler v. Lopus, Cro. Jac. 4.

should recover because of the fraud.¹ There was only one exception to this rule, which formerly obtained, and that was in favor of cases where there was an implied warranty of ownership upon the sale of a chattel,—in which it was not necessary to allege fraud in order to create a liability on the part of the vendor,—the simple affirmation of the seller being deemed equivalent to an express warranty of title. But, even in these cases, the allegation of fraud was generally made.²

§ 365. At a later date, however, the form of pleading on a warranty was changed from *tort* to *assumpsit*, in which the gist of the action is the promise or undertaking of the vendor, and not his fraud; and in the case of *Steuart v. Wilkins*, this form of declaring in *assumpsit* was discussed and regularly established as the proper form in cases of express warranty. This opened the way for many modifications of the law relating

¹ *Furnis v. Leicester*, Cro. Jac. 474. See, also, *Dale's case*, Cro. Eliz. 44; *Ekins v. Tresham*, 1 Lev. R. 102; 1 Sid. R. 146.

² *Bayard v. Malcolm*, 1 Johns. R. 469; *Defreeze v. Trumper*, 1 Johns. R. 274. In the case of *Crosse v. Gardiner*, Carth. 90, 1 Shower, R. 68; 3 Mod. R. 261, the declaration alleged, that the defendant sold two oxen, "which the defendant had then in his possession, and he *adtrunc et ibidem falso et malitiose affirmabat*, that those oxen were his, when, in truth, they were the proper goods of T. S.; and a verdict having been given for the plaintiff, it was moved in arrest of judgment, that the declaration was ill and that the action would not lie, because the plaintiff had not laid in his declaration, that the defendant (*sciens, that these were the oxen of T. S.*) did affirm them to be his own. But the Court held, "that the action would lie upon a bare affirmation, *ut supra*; and that the case differed from the books cited, because here the plaintiff had no means to know to whom the property of the oxen did belong, but only by the possession." It would seem, nevertheless, that fraud was directly alleged in the declaration by the words *falso et malitiose*, and therefore, the declaration, "*ut supra*," was sufficient. The Court, in this case, however, distinguishes between what is a sufficient allegation of fraud ordinarily, and what is sufficient in cases where property, not belonging to the vendor, is sold by him as his own. See, also, *Medina v. Stoughton*, 1 Ld. Raym. R. 593.

to warranty, by reducing the distinction between cases of implied and of express warranty to merely the kind of proof necessary to establish the one or the other. As soon as Lord Chief Justice Holt introduced the modification, which became inevitable upon the change from the old action, that, wherever there was an intention to warrant, no formal words were necessary, and that a warranty might be presumed from the circumstances and nature of the particular case, the distinction between the two kinds of warranty became merely formal, and the province of the maxim, *caveat emptor*, was greatly trenched upon. Gradually, from that time to the present the old common law rule of *caveat emptor* has been losing ground, and the law has been tending towards the doctrine of the Roman law, which is its antipode, — *caveat venditor*, — until it now occupies a middle ground between the two, by requiring the strictest good faith on the part of the seller in all that he says and does, and throwing on the buyer the responsibility for any foolish mistakes, or wrong conclusions, which may result from his trusting to his own judgment.¹

¹ The first case, in which this distinction was stated, is *Roswell v. Vaughan*, Cro. Jac. 197, which was an action brought to recover damages for a failure of title to the tithes of the vicarage at South Stoke, then in the possession of another. Tanfield, Chief Baron, said: "But here he had not any possession; and it is no more than if one should sell lands wherein another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment; it is at the peril of him who buys, and not reason he should have an action by the law, where he did not provide for himself." Here, it will be observed, there was no affirmation of title. The rule is also stated by Lord Holt in an *obiter dictum* in *Medina v. Stoughton*, 1 Salk. R. 210, in these words: "Where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having possession is a color of title, and perhaps no other title can be made out; *aliter* where the seller is out of possession; for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty or a good title." But in the report of the same case in *Ld. Raymond*, R. 593, no such *dictum* appears; and Mr. Justice Buller, in *Pasley v. Freeman*, 3 T. R.

§ 366. The law, in respect to implied warranty in cases of sales, as it now stands, seems to be, that a warranty is implied

58, commenting on this *dictum*, says : “ If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor’s being in or out of possession. The thing is bought of him, and in consequence of his assertion ; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because the vendee has then nothing but the warranty to rely on.” The last case directly overrules the former, both the cases supposing an express affirmation of title by the vendor. The rule, therefore, that an implied warranty of title does not arise when the vendor has no possession of the goods, where there is no affirmation of ownership, thus far rests on the old case of *Roswel v. Vaughan*, decided when the strictest rules of *caveat emptor* were enforced. I am aware of no subsequent case in England where a distinction has been made between a vendor in possession and a vendor out of possession, of the subject-matter of sale. In *Adamson v. Jarvis*, 12 Moore, R. 253, S. C. 4 Bing. R. 73, where goods were sold by an auctioneer for his principal, who had no title to them, the distinction was not necessary, for the auctioneer had possession of the goods, and besides, there was a direct affirmation of ownership by the principal creating an express warranty. The rule laid down in this case merely affirms the undisputed doctrine, that where the vendor sells goods in his possession, affirming them to be his, he warrants the title. Mr. Justice Blackstone, in his *Commentaries*, (Part 3, p. 451,) alludes to no such distinction, but thus broadly states the law : “ By the civil law, an implied warranty was annexed to every sale, in respect to the title of the vendor ; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose.” Again, in *Purvis v. Rayer*, 9 Price, R. 488, a written agreement for the sale of the lease of a house was made by an agent of the lessee, the house being in the possession of the lessee and not of the agent, except by implication, and the abstract of title not satisfying the purchaser, he declined to fulfil the agreement, — and the question arose, whether a person contracting to purchase a leasehold interest can insist on being shown that the lessor himself had a good title, and it was held, that he could. The court, after great consideration, and apparently after consultation with Lord Eldon, gave the decision. The Lord Ch. Baron said : “ A vendee is not bound to take a lease without being satisfied in that respect, merely because the lessee has neglected to stipulate with his lessor for that right, which would have enabled him to show the validity of his title when he should be disposed to sell his interest, and without which he ought not to oblige a purchaser to take it. It might as

in five cases. 1st. That the seller has a valid title. 2nd. That the subject-matter is merchantable. 3rd. That it is reasonably

well be said, as it seems to me, that any other vendor of property, not his own, cannot be compelled to show a title to what he sells, if inability to do so is to be considered a valid excuse. Surely a vendee of a lease is not to lose his money because the vendor has not the means of producing his lessor's title, or to be in that respect in a different and worse situation than the purchaser of any other interest, merely because the lessee has not for his own sake taken care to provide that the lessor shall obviate the difficulty, as he might have done, by furnishing him with the means of satisfying a purchaser, in case he should require it.

"It is said, that it is now the usual course to state in the advertisement for the sale of any such property, that the title of the lessor will not be warranted. That may be so; and leases may be purchased on such terms, if purchasers are to be found who will buy them with so much rashness; but the question here is, whether a court of equity will compel a man to take a lease which he has contracted to purchase generally, and without any thing further passing between the parties, where the lessee will not or cannot show that his lessor has a good title to the subject-matter of the lease. I am of opinion that I cannot make the purchaser suffer for the laches of the vendor. The advertisement does not give him any right to put the vendee, to any risk. The general doctrine of equity is against such a proposition, unless the case of leasehold property be an exception, and an anomaly with respect to all other property." See, also, *Sonter v. Drake*, 5 Barn. & Adolph. 999, in which case Lord Denman said: "For the reasons above given, we come to the conclusion, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity."

In this country, Mr. Chancellor Kent in his Commentaries, (Vol. 2, Lect. xxxix p. 478,) states the distinction, and says: "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." The cases relied upon by him in support of this doctrine, are *Roswel v. Vaughan*, Cro. Jac. 197, and *Medina v. Stoughton*, 1 Salk. R. 210, which we have considered above. In the note, however, he says of Mr. Justice Buller's comment on the latter case, overruling it, in *Pasley v. Freeman*, 3 T. R. 57, "There is good sense and equity in the observation."

fit for the use for which it is known to be intended. 4th. That it does not contain latent defects. 5th. That it corresponds to

Thus far his statement, therefore, stands on the old case of *Roswel v. Vaughan*. But he goes on to say "a fair price implies a warranty of title, and the purchaser may have a satisfaction from the seller if he sells the goods as his own, and the title proves deficient." In *Gookin v. Graham*, 5 Humph. (Tenn.) R., the court say: "In a sale of personal property there is always an implied warranty of title, unless it be purchased under such circumstances as clearly show that the vendee intended to risk the title; as if the vendor be not in possession, but *the same be held adversely* by another." Undoubtedly, where the circumstances indicate that the vendor does not intend to warrant, and that the vendee *takes the risk* of the title, there would be no warranty. Still the question remains, whether, in the absence of all circumstances importing a refusal to warrant the title, such as an *adverse* holding by a third person, of which the vendee has notice, the fact that goods are not in the possession of the vendor, *of itself*, absolves the vendor from an implied warranty of title. The rule laid down in this case would seem to indicate that it does not. Certainly, the mere fact that the goods are in the possession of a third person, does "not *clearly* show, that the vendee intended to risk the title," although if the goods be held *adversely*, and the vendee know such fact, it might have such an effect.

The only case in which the distinction between sales of goods in the possession of the vendor, and sales of goods out of his possession, has formed the basis of an adjudication in this country, is *McCoy v. Archer*, 3 Barbour, Sup. Ct. R. 323. In this case, the very point under discussion is fully and elaborately examined, and the learned judge concludes, after commenting upon the cases, in favor of the distinction stated by Lord Holt. He says: — "I find no case, either in Great Britain or in this country, sustaining the position that a vendor, who makes no affirmation or representation on the sale of a chattel in the possession of a third person, can be held liable for a failure of title, on an implied warranty. On the contrary, when any reason is given for the rule, the possession of the vendor is, even in the cases cited by Story, evidently regarded by the courts as the foundation of the implied warranty of title." "The maxim with regard to sales is, *fides servanda*; and if there be no express contract of warranty, general rules of implication should be adopted with this maxim constantly in view. A warranty should only be implied when good faith requires it. I think it is fair and equitable to hold that the possession of the vendor is equivalent to an affirmation of title, and that in such case the vendor shall be held to an implied warranty of title, though nothing be said on the subject between the parties. But if the property sold be, at the time of the sale, in the possession of a third

the sample, if a sample be shown. These different warranties, and the circumstances under which they are implied, we shall consider consecutively.

person, and there be no affirmation or assurance of ownership, no warranty of title should be implied. If, however, there be an affirmation of title where the vendor is not in possession, the vendor should be subjected to the same liability as if he had the possession of the property. We have not, on this subject, adopted the civil law rule, *caveat venditor*; but the rule of the common law, *caveat emptor*, is our law." The final decision of the case does not seem to have turned wholly on this question, for it appears, and is stated, by the learned judge, that there are circumstances tending strongly, if not conclusively, to show, that "the property was purchased" by the vendor "at his own risk."

But this decision, able and elaborate as it is, does not fully recommend itself on principle, and must be difficult of application. The only case by which it is supported is that of *Roswel v. Vaughan*, Cro. Jac. 197, which was decided as long ago as 1607, when the doctrine of *caveat emptor* was much sterner in its operation than it now is, and when the form of action on a warranty was in *tort* and not in *assumpsit*, the latter form being adopted at a later day. This very case was "an action on the case in the nature of deceit," and the ground upon which the argument and decision proceeds is, that there is no evidence or indication of *tort* or *deceit* by the seller, without which he would not be liable. So, also, *Crosse v. Gardiner*, 1 Shower, R. 68, and *Furnis v. Leicester*, Cro. Jac. 474; *Medina v. Stoughton*, 1 Salkeld, R. 211, are all actions on the case. So, also, *Pasley v. Freeman*, 3 T. R. 58, was an action in the nature of a writ of deceit. Indeed, nearly all the old cases are of this kind.

The introduction of *assumpsit* as the true form of declaring on a warranty, (see *Stewart v. Wilkins*, Douglas, R. 18,) avoided the necessity of proving deceit or fraud, and threw the basis of the claim upon the promise of the defendant. Then arose the doctrine of *implied* warranty, limiting the old rule of *caveat emptor*, which before always obtained, except in cases of *express* warranty or *deceit*. Under the previous course of pleadings, whether the seller were out of possession or in possession, if there were no affirmation operating to deceive, no action could be maintained. If there were an affirmation, the seller being in possession, it was considered as an assumption of fraud, because the vendee might have no means of examining into the title, and the circumstances of the case indicated no adverse rights. But where the vendor was out of possession, no such presumption of fraud arose,

§ 367. And, first, — A warranty of title in the vendor is

because it was considered as being too violent. The bare assumption of ownership without possession, being evidently not so strong a badge of fraud as an assumption of ownership with possession. Therefore, in the latter case, the vendee was bound to prove fraud. Yet, even in these cases, Mr. Justice Buller says: "If an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases then are so far from being authorities against the present action, that they show that, if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit." *Pasley v. Freeman*, 3 T. R. 58. Circumstances which afford a presumption of *fraud* may, however, well be required to be more stringent than those creating a presumption of *title*.

But in the action of *assumpsit* no fraud need be proved or alleged, the gist of the action being the promise or undertaking of the defendant. The question is, then, whether, when a person undertakes to sell an article, he impliedly asserts that he has a title to it. Undoubtedly, he agrees to sell. But if he have no title he cannot sell. The implication of title is necessary to the very existence of the contract. It is the very ground-work of the whole undertaking. Such being the case, we confess ourselves to be utterly at a loss to perceive the ground of any distinction between his undertaking to sell goods in his possession, and to sell goods in the possession of a third person, and are in the same predicament with Mr. Justice Buller. Indeed, the reasoning of that eminent judge perfectly recommends itself to us. "And if there be any distinction, it seems that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the (implied) warranty to rely on." Whether the warranty be express or implied, the reasoning is the same. The vendor undertakes to *sell* goods out of his possession. Now, unless he has a title, he cannot sell them, except as agent for one who has a title. Therefore, if he sell them, he asserts his title by the simple fact of sale. Can it be said, that the mere fact of the goods not being in his possession creates an agreement on the part of the vendee to take the risk of title, the vendee having no knowledge or notice of *adverse* claims by such third person or by any other person? This certainly, would be a very violent and injurious implication, and one which certainly ought not to supersede the natural and necessary implication of title growing out of the vendor's undertaking to sell. There may be

implied in the fact that he undertakes to sell.¹ It has, indeed,

undoubtedly cases where there are other circumstances indicating that the vendee assumed the risk, but the mere fact of non-possession cannot legitimately lead to such an inference. Indeed, it would seem, that it ought, on general principles, to be the duty of the vendor to advertise the vendee of any adverse claim, or directly to disclaim any warranty of title, if he would avoid a liability therefor. Mere silence is a representation of title in a person who sells goods.

Besides, who should properly suffer in such a case? The innocent vendee, who has supposed, most naturally, most necessarily, that the seller had a title or right to sell, and who has paid a full consideration therefor, or the vendor, who has sold what he had no right to sell, and has pocketed the full price? The equities of the case are manifest.

That the affirmation of title is a natural implication from the selling, is evident. Suppose one person should ask of another who is selling him goods, whether he will warrant that the goods belong to him? Would it not seem an extraordinary, nay, almost an insulting question?

When it is considered that the mere sale of provisions creates an implied warranty as to wholesomeness, on the ground "that it may be presumed, that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food implies this, and it may be readily presumed that a common vendor of articles of food, from the very nature of his calling, knows whether they are unwholesome and unsound or not," (per Mr. Ch. Justice Shaw, in *Winsor v. Lombard*, 18 Pick. R. 57,) and that an implied warranty arises in the case of a manufacturer against any latent defect, (see post § 838,) because of the necessary trust reposed in the vendor,—surely, for the same reasons, a warranty of title ought to be implied.

Again, when goods not in the possession of the vendor are sold, and they turn out not to be his property, the sale must be founded either on *mistake* or *fraud*, for either the seller supposed he had a right to sell the title, when he had not, which is a *mistake* going to the essence of the contract and affording a sufficient ground for the vendee to avoid the sale or recover his money advanced thereon, (see *Allen v. Hammond*, 2 Sumner, R. 394,) or if the vendor knew that the title was disputed, or that he had no title or right to sell, and did not notify the fact to the vendee, it would be a direct *fraud*, for which the vendee could recover. Considered in this light, it would make no difference whether the goods were in the possession of the vendor or not.

¹ Black. Comm. Part iii. p. 451, Comyn on Contracts, p. 13. *Purvis v. Rayer*, 9 Price, R. 488; *Souter v. Doake*, 5 Barn. & Adolph. 999; *Pasley v. Freeman*, 3 T. R. 58; *Deering v. Farrington*, 3 Keb. R. 304;

been held that a warranty of title is only implied, where the goods sold are in the possession of the vendor, and that when

Robinson v. Anderton, Peake, R. 94 ; Vibbard v. Johnson, 19 Johns. R. 78 ; Blasdale v. Babcock, 1 Johns. R. 518 ; Heermance v. Vernoy, 6 Johns. R. 8 ; Mockbee v. Gardner, 2 Harr & Gill, 177 ; Strong v. Barnes, 11 Vermt. R. 221 ; Coolidge v. Brigham, 1 Metcalf, R. 551 ; Defreeze v. Trumper, 1 Johns. R. 275 ; Chism v. Wood, Hardin, R. 531 ; Payne v. Rodden, 4 Bibb, R. 304 ; Murray v. Judah, 6 Cowen, R. 491 ; Chancellor v. Wiggins, 4 B. Monroe, 201 ; Tucker v. Gordon, 4 Eq. R. (So. Car.) 53, 58 ; Colcock v. Reid, 3 McCord, R. 513 ; Swett v. Colgan, 20 Johns. R. 202 ; McCoy v. Artcher, 3 Barbour, Sup. Ct. R. 323.

In the late case of *Morley v. Attenborough*, 3 Welsb. Hurlstone & Gordon (Excheq.) R. 508, this doctrine has, however, been disputed. It is said, by Baron Parke, after a review of the old authorities on this question : "From the authorities in our law, to which may be added the opinion of the late Lord Ch. J. Tindal, in *Ormrud v. Huth*, 14 Mees. & Welsb. 664, it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title unless there is an express warranty, or an equivalent to it, by declarations or conduct ; and the question in each case, where there is no warranty in express terms will be whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved, as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement ; and without proof of such usage, the *very nature of the trade* may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons." This last sentence seems to yield the whole question. Usage of trade always imports a warranty of title in all cases unless, perhaps, where the very nature of the contract or the facts of the case plainly show that the vendor does not possess the title to the subject, nor the right to sell, and that the vendor takes the risk knowingly. And if the *nature of the trade* is enough to create an implied warranty of title, every sale would come within the rule simply because it is a *sale*, which cannot be made by any person not having a title. In the case in which this judgment was delivered, a pawnbroker in a sale of forfeited articles, which he did not profess to own, sold a harp which had been pawned by a person who did not own it, and the owner reclaimed it of the vendee, who brought an action therefor against the pawnbroker. From the very nature of the sale in this case, it was thought that the pawnbroker could not be understood as warranting his title ; the vendee being affected with notice that the article sold had been merely forfeited upon a pledge. But we do not see why, in such a case, the inno-

they are not in his possession a direct affirmation of ownership is necessary to entitle the vendee to recover on the failure of

cent vendee should suffer. The vendee had trusted the pawnbroker, the pawnbroker had trusted the pawn, and the remedy of each should be against the party trusted by him. What consideration was there to support the sale to the purchaser? Why could he not reclaim the purchase-money on the ground of a total failure of consideration? Any rule except the simple one, that a sale imports a warranty of title leads us into constant difficulties. The court go on to say, after admitting that executory contracts create an implied warranty of title: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on a sale of a forfeited pledge, *eo nomine*. Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether, on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed. On this question we are without any light from decided cases.

"In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking any thing more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law (see 1 Jac. 1, c. 21,) he gains no better title by a pledge than the pawn had; and as the rule of the common law is, that there is no implied warranty from the mere contract of sale itself, we think, that where it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had; and therefore we think the rule must be absolute.

"Since the argument, we find that there was a count for money had and received, as well as the count on the warranty, in the declaration. But the attention of the judge at the trial was not drawn to this count, nor was it noticed on the argument in court.

"It may be, that though there is no implied warranty of title, so that the

title. But such a distinction seems not only to be founded in no good reason, but to be contrary to the weight of authority.¹

vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is, whether there is an implied warranty."

Mr. Bell, on the contrary, in his Treatise on the Contract of Sale, page 95, says, "As no one can justly sell any thing without having a full title of ownership, or at least a right to dispose of the subject which he sells, he, by the act of selling, gives an implied assurance to the buyer, that he holds such powers as effectually to make the transfer to him." "This general doctrine is laid down as a necessary result of the principles of the contract by the institutional writers of all countries." Blackstone lays down the same rule and says, "It is constantly understood that the seller undertakes that the commodity he sells is his own," 3 Black. Comm. 165. See, also, 2 Black. Comm. 451. Mr. Comyn, in his Treatise on Contracts, repeats

¹ Crosse v. Gardiner, 1 Shower, R. 68; S. C. 3 Mod. R. 261; Furnis v. Leicester, Cro. Jac. 474; Defreeze v. Trumper, 1 Johns. R. 274; 2 Black. Comm. 451; 3 Comm. 166; Spratt v. Jeffery, 10 Barn. & Cres. 249; Robinson v. Anderlin, Peake, N. P. R. 94; Peto v. Blades, 5 Taunt. R. 657. There is an *obitum dictum* by Lord Holt, in Medina v. Stoughton, as reported in 1 Salk. R. 210, that where a seller is out of possession, he does not warrant the title. But in a report of the same case by Lord Raymond, 593, no such *dictum* occurs; and it is expressly negated by Buller, J., in Pasley v. Freeman, 3 T. R. 58. See, also, Bayard v. Malcolm, 1 Johns. R. 469; Reed v. Barber, 3 Cowen, R. 272; Souter v. Drake, 5 Barn. & Adolph. 992, 1002; S. C. 3 Nev. & Man. 40; Purvis v. Rayer, 9 Price, R. 488; S. C. 1 Sugd. Vend. & Purch. 335. The rule of the text is supported by all the late cases, and the distinction made by Lord Holt has never obtained. Indeed, it does not seem to stand upon any satisfactory ground. For, if a man undertake to sell a thing, whether it be in his possession or not, he virtually warrants his right, to pass the title, since, otherwise, he would have no right to sell it. See Coolidge v. Brigham, 1 Metc. R. 551; Dorsey v. Jackman, 1 Serg. & Rawle, 42; Harvey v. Young, Yelv. R. 21, Am. Ed. note by Metcalf; Reed v. Barber, 3 Cow. R. 272; Colcock v. Reid, 3 McCord, R. 513; Heerman v. Vernoy, 6 Johns. R. 5.

If a man undertake to sell a thing he virtually warrants his right to pass the title, since otherwise he would have no right

the rule in the same words, and by way of illustration, adds, "Where a man sells goods as his own, when they are the goods of a stranger, an action lies against him without an express warranty." In *Doe & Gray v. Stanion*, 1 Mees. & Welsb. 701, it is said, "In contracts for the sale of real estate the agreement to make a good title is always implied." *A fortiori*, this would be true of personal property. In America the doctrine of the text has been repeatedly affirmed.

In *Vibbard v. Johnson*, 19 Johns. R. 78, the court say, "There is no doubt that in every sale of a chattel for a sound price, there is a tacit and implied warranty, that the vendor is the owner and has a right to sell." See, also, *Case v. Hall*, 29 Wend. R. 103. In *Blasdale v. Babcock*, 1 Johns. R. 518, which was an action on the case on an *implied* warranty in the sale of a horse, the judge charged the jury, that, "the defendant, by the sale of the horse, warranted it to be his property," and upon a new trial the charge was supported by the full court. In *Heermance v. Vernoy*, 6 Johns. R. 8, the court say, "Every man is considered as warranting the title of personal property which he sells, although there be no express warranty for that purpose." In *Payne v. Rodden*, 4 Bibb, (Kentucky,) R. 304, where there was no affirmation of title, the court say, "Although a seller is not presumed to undertake for the soundness of goods which he sells, yet, with respect to a chattel in the possession of the vendor, it is settled by a current of authority that there is an implied warranty of title." In *Mockbee v. Gardner*, 2 Harr. & Gill, 177, the court say, "It is a general and familiar principle, that there exists in every sale of personal property an implied warranty of title." In *Ritchie v. Summers*, 3 Yeates, R. 531, Smith, J., says, "The act of selling chattels is such an affirmation of property, *that on that circumstance alone*, if the fact should turn out otherwise, the value can be recovered from the seller. It is constantly understood that the vendor of goods undertakes that the commodity he sells is his own." In *Boyd v. Bopst*, 2 Dall, R. 91, the same statement in the same words is made. In *Coolidge v. Brigham*, 1 Metcalf, R. 551, Mr. Justice Wilde says, "In contracts of sale, a warranty of title is implied. The vendor is always understood to affirm, that the property he sells is his own. In *Defreeze v. Trumper*, 1 Johns. R. 275, the court say, "An express warranty was not required; for it is a general rule, that the law will imply a warranty of title upon the sale of a chattel." The same rule, in almost the same words, is also affirmed in *Swett v. Colgan*, 20 Johns. R. 202. In *Willing v. Peters*, 12 Serg. & Rawle, 181, the court say, "On the sale of personal property, there is an implied warranty by the vendor unless the agreement be to the contrary."

to sell it. When there is a direct affirmation of ownership, it has uniformly been held to create an implied warranty; whether the subject-matter be in his possession or not, and as ownership or a right to sell is implied by the very fact of sale, it is difficult to see why his acts have not the same force as his simple affirmation.

§ 367 *a*. A warranty of title would not, however, arise where it is expressly negated by the parties, or where the peculiar circumstances of the case clearly show that the vendor did not intend to warrant, and was so understood by the vendee. So, also, the character in which a vendor sells, may perhaps, prevent this implication of warranty, — as if he be a pawnbroker, or occupy a known position in which he does not pretend to be an owner or to assume personal responsibilities.² So, also, it has been held, that a trustee or administrator cannot be understood to warrant a title for a longer time than the purchase-money may remain in his hands, or under his control.³ But all such cases stand on peculiar grounds, and it should clearly appear that no personal trust in respect of the title was reposed in the vendor.⁴

See, also, *Dorsey v. Jackman*, 1 Serg. & Rawle, R. 44, and opinion by President Roberts, in note, *Lanier v. Auld*, 1 Murph. R. 138; *Dean v. Mason*, 4 Conn. R. 428. Chancellor Kent lays down the same doctrine, — “A fair price,” he says, “implies a warranty of title; and the purchaser may have a satisfaction from the seller if he sells the goods as his own, and the title proves defective. The distinction between the responsibility of the seller as to the title and as to the quality of the goods sold is well established in the English and American law.” 2 Kent, Comm. p. 478.

¹ *Spratt v. Jeffery*, 10 Barn. & Cres. 249; *Rodrigues v. Habersham*, 1 Spear (So. Car.) R. 314; *Smith v. The Bank of South Carolina*, Riley's Ch. R. 113; *McCoy v. Archer*, 3 Barbour, Sup. Ct. R. 331; *Purvis v. Rayer*, 9 Price, R. 488; *Easley v. Garrett*, 9 Barn. & Cres. 928.

² *Morley v. Attenborough*, 3 Welsb., Hurls. & Gord. (Exch.) R. 508.

³ *Mockbee v. Gardner*, 2 Harr. & Gill, 176. But see *Cripps v. Reade*, 6 T. R. 606.

⁴ *Peto v. Blades*, 5 Taunt. R. 657; *Adamson v. Jarvis*, 4 Bing. R. 66.

§ 367 *b*. In an executory contract of sale, the vendee may refuse to accept the article sold unless the vendee make him a clear title ;¹ and, if he have advanced the purchase-money, he may, upon discovery of a total failure of title, rescind the contract and recover back his advances in an action of *assumpsit* for money had and received.² But where the sale is consummated, and the article delivered and accepted, it does not seem to be quite settled in this country, whether the vendee may bring a special action of *assumpsit* on the warranty, so long as his title and possession are undisputed. The stronger opinion would seem to be that he cannot ; upon the ground, that the owner may never enforce his claim, or if he do, the vendor may settle with him, in either of which cases, there would be no breach of warranty³ to support the action. A judicial eviction would not, however, be necessary, provided a clear title be apparent in the claimant. Nor, indeed, would the vendee, on general principles, seem to be bound to support the expense of defending a suit, — but upon suit being brought, he would seem to be entitled to abandon the thing, and to insist on the seller's war-

¹ *Parvis v. Rayer*, 9 Price, R. 488 ; *Chambers v. Griffith*, 1 Esp. R. 150 ; *Souter v. Drake*, 5 Barn. & Adolph. 999 ; *Judson v. Wass*, 11 Johns. R. 528 ; *Clute v. Robison*, 2 Johns. R. 613 ; *Tallmadge v. Wallis*, 25 Wend. R. 117.

² See Post § 423 ; *Morley v. Attenborough*, 3 Welsb., Hurls. & Gord. (Excheq.) R. 514 ; *Farrer v. Nightingal*, 2 Esp. 639 ; *Cripps v. Reade*, 6 T. R. 606 ; *Shoee v. Webb*, 1 T. R. 732 ; *Johnson v. Johnson*, 3 Bos. & Pull. 162 ; *Chambers v. Griffith*, 1 Esp. R. 150 ; *Berry v. Young*, 2 Esp. R. 640, note ; *Picketon v. Litecote*, 21 Viner's Abr. tit. Vendor and Vendee (B) ; *Robinson v. Anderton*, Peake, R. 94 ; *Camfield v. Gilbert*, 4 Esp. R. 221 ; S. C. 3 East, R. 516.

³ The rule is thus laid down in *Case v. Hall*, 21 Wend. R. 103 ; and *Vibbard v. Johnson*, 19 Johns. R. 79 ; *Brown v. Reeves*, 19 Martin, (Louis.) R. 235. It is also the rule of the Roman Law, Post § 367 *c*. But the opposite doctrine is asserted in *Scott v. Scott's Admr's*, 2 A. K. Marshall, (Kentucky) R. 218 ; and *Payne v. Rodden*, 4 Bibb. (Kentucky) R. 304 ; *Chancellor v. Wiggins*, 4 B. Monroe, R. 201.

ranty, or to call upon him to defend the suit.¹ Yet if there be any affirmation of ownership, though there be strictly no express warranty of title, the law will import a technical deceit, so as to support an action on the case at once.² And if there be actual fraud, the seller knowing the goods sold not to belong to him, an action on the case would immediately lie on the discovery of it.³ So, also, fraud is admissible by way of defence to reduce or extinguish a claim for the purchase-money.⁴

§ 367 c. The doctrine of the Roman Law in respect to warranty of title, though different in terms from the Common Law, was in substance the same. In the contract of *do ut des*, which was nothing more than what is called in the Common Law an executory contract, a warranty of title or proprietorship was implied, and the money paid could be at once recovered, on failure of the title, and before eviction or disturbance of possession by the owner. “*Dedi tibi pecuniam, ut mihi stichum dares. Finge, alienum esse stichum, sed te tamen eum tradi-*

¹ See Bell on Sales, p. 95. Domat, Civil Law, Part. I. Book I. tit. 2, sect. 10, art. iii. (Strahan's translation) art. vi. Ib. art. xxii.

² Bacon, Abr. Action on the Case, tit. D. *Cross v. Gardner*, 1 Shower, R. 68; *Furnis v. Leicester*, Cro. Jac. 474; *Pasley v. Freeman*, 3 T. R. 58; *Case v. Hall*, 24 Wend. R. 103; *Vibbard v. Johnson*, 19 Johns. R. 79; *Modena v. Stoughton*, 1 Salk. R. 210; Ib. 1 Ld. Raym. R. 593; *Springwell v. Allen*, 2 East, R. 448 n.; *Dale's Case*, Cro. Eliz. 44; *Peto v. Blades*, 5 Taunt. R. 657; *Adamson v. Jarvis*, 4 Bing. R. 66.

³ Ibid.

⁴ Ibid.; *Case v. Hall*, 24 Wend. R. 103; *Becker v. Vrooman*, 13 Johns. R. 302. Where an action is brought in an executory contract to recover advances, or on an executed contract after eviction, it is not necessary to prove fraud on the part of the vendor; he is equally liable, although he act in good faith and in ignorance of any defect in his title. But where an action on the case is brought, deceit is the ground of the claim and it must be made out; if this simple rule be kept in view, it will serve to explain the ground upon which the early cases were decided, the apparent confusion between them and later cases, growing mainly out of the pleadings and form of action.

disse; repetere a te pecuniam potero, quia hominem accipientis non feceris.”¹ So, also, in the contract *permutatio*, or exchange, the same warranty was implied.² But in an immediate sale, consummated on both sides, which is the real meaning of the contract terms, *emptio* and *venditio* in the Roman law, the seller was only understood to warrant to the vendee the absolute right to retain undisputed possession and enjoyment of the thing sold. “Hactenus tenetur ut rem emptori habere liceat, non etiam ut ejus faciebat;”³ that is, as we should say in the common-law language, it was a warranty of title, upon which no recovery could be had until the vendee’s right of possession and enjoyment was attacked or title was questioned. By the practice of the Romans, the vendee had the right of denouncing or notifying to the seller the action brought against him, and leaving to him the defence of the suit, but he could not bring an action against him on the warranty, until condemnation was passed by the Court.⁴ By the French practice, however, the vendee may sue the vendor upon his warranty, as soon as any adverse claim is made, or there is any interference with his enjoyment of the thing purchased.⁵ Again, in case of fraud,—as where the seller knew the article sold belonged to another,—he became immediately liable, although the possession of the vendee was undisturbed.⁶

¹ Dig. Lib. xii. tit. iv. De Conditione causa, § 16. Celsus. libro iii. Degestorum.

² Dig. Lib. xix. tit. iv. De rerum permutatione.

³ Dig. Lib. xix. tit. 1. § 30.

⁴ Cod. de Evict., lib. 8, tit. 45. Pothier, Contrat de Vente, § 108. Caillet ad. tit. Cod. de Evict., lib. 8, tit. 40.

⁵ Domat, Part 1, Book 1, tit. 2, sect. x. art. 6. Bell on Sales, 95. Pothier, Contrat de Vente, § 108.

⁶ Si sciens alienam rem ignorantem mihi vendideris, etiam, priusquam evincatur, utiliter me ex empto acturum putavit in id, quanti mea intersit, mea esse factam; quamvis enim alioquin verum sit, venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut ejus faciat, quia tamen dolum malum ab esse præstare debeat, teneri eum, qui sciens alienam, non suam ignorantem vendidit. Dig. de Actionibus Empti et Venditi, lib. xix., tit. 1, lex. 30, § 1.

§ 367 *d*. In equity, a warranty of title is always implied, and the vendor cannot enforce a specific performance on total failure of title, nor indeed on a partial failure which goes to the essence of the consideration.¹ In such a case, also, the contract would, on application to a Court of Equity, be set aside, on the ground of mistake.² Yet if the vendee choose, he may, on a failure of title as to a part, generally, insist on a specific performance in respect to the part to which a good title can be made, with a corresponding abatement of price, if the difference of value be susceptible of determination.³

§ 367 *e*. In respect to this warranty of title or possession, the difference between the Common Law and the Roman Law from which it was borrowed, is almost purely verbal and formal. It was implied in the Roman Law in all cases of immediate or executory contracts of sale, and in exchanges, whether there were any affirmation of ownership or not. “*Quod si nihil convenit, tunc ea præstabitur quæ naturaliter insunt hujus judicii potestate, et imprimis ipsa rem præstare venditorem oportet.*”⁴ “*Non dubitatur etsi specialiter venditor evictionem non promiserit, re evictâ ex empto competere actionem.*”⁵

§ 367 *f*. The subtle distinction between an exchange and

¹ *Graham v. Oliver*, 3 Beav. R. 124; *Roffey v. Shallcross*, 4 Madd. Ch. R. 227; *Dalby v. Pallen*, 3 Simons, R. 29, 1 Story, Equity Jurisp. § 778, 779, and cases cited.

² 1 Story Equity Jurisp. § 143 a, § 161, and cases cited. See, also, *Gillespie v. Moore*, 2 Johns. Ch. R. 585; *Allen v. Hammond*, 11 Pet. R. 71; *Roffey v. Shallcross*, 4 Madd. Ch. R. 227. Ante § 155.

³ *Thomas v. Dering*, 1 Keen, Ch. R. 729; *Mortlock v. Buller*, 10 Ves. R. 315; *Paton v. Rogers*, 1 Ves. & Beam. 351; *Hill v. Buckley*, 17 Ves. R. 395; *Milligan v. Cooke*, 16 Ves. R. 1; *Dale v. Lister*, 16 Ves. 7.

⁴ Dig. Lib. xix., tit. i. art. ii. § 1. De Actionibus Empti et Venditi.

⁵ Cod. Lib. 6. De Evict. Domat on the Civil Law, Part 1, Book 1, tit. 2, sect. 10, art. 6. Ib., Cushing's Edit. of Strahan's Translation, vol. 1, p. 231, § 376.

a sale which created a warranty in the former contract, so as to give an immediate right of action before possession was disputed, while by the latter contract, the warranty was not considered as broken, until possession by the vendee was disputed, has never been admitted in our law. Whatever may be its metaphysical correctness, it is too fine for practical purposes. All sales are in reality exchanges, money being merely representation. The difference, however, practically, only relates to the time when the remedy of the vendee attaches, — the distinction in other respects between a transfer of proprietorship and of undisputed possession, being merely metaphysical. It was even a matter of dispute among the Romans themselves, whether there was any true foundation for this distinction between an exchange and a sale. Sabinus and Cassius, the leaders of the Sabinian sect, thought that an exchange was nothing else than the ancient form of sale, and that the same rules applied to both contracts. This opinion also Caillet supports in his commentary on the Code.¹ Nerva and Proculus, the Proculæans, the founders of the school, on the contrary, maintain that the contracts are distinct, and their opinion is supported by Justinian, Paul, and others, and generally prevailed.²

§ 367 g. But no such distinction as that proposed in the Common Law between the sale of articles in the vendor's possession and of those out of his possession, ever was recognized in the Roman Law. The warranty, whether of possession or of proprietorship, was always created by implication from the fact of sale or exchange, or *do ut des*, and did not depend upon

¹ Meermani Thesaurus, Vol. 2, ad. L. 5. diet. tit.

² Justin. Instit. de Empt. et Vendit. Lib. iii. tit. xxiii. § 1. § 2. Pothier also supports this opinion, Contrat de Vente, § 48. See, also, Duranton, Contrat de Vente, Liv. 3, tit. 6, § 16. Paul. Dig. de Contrat. Empt., Lib. 1, § 1. Deg. de Rerum Pamulatinu, Lib. xix. tit. iv. § 1.

the question whether the article was in the possession of the vendor. The Roman law was often metaphysical in its distinctions, but not arbitrary.

§ 367 *h*. The civil Code in France would seem to settle this question by the simple statement "La vente de la chose d'autrui est nulle."¹ The necessary inference from such a statement would seem to be that the want of power to pass the proprietorship to the vendee, annulled the sale. Yet so strong a hold had the Roman practice taken upon the French mind, that, despite this statement in the Code, it has been maintained, that a sale carries only a right of possession to the vendee, not a right of proprietorship. Toullier supports this doctrine,² and it has received countenance from the Court of Cassation.³ But the great weight of authority is against it, and Duranton, Duvergier, Delvincourt, Fremery, among others, agree, that by the Code, the rule of the Roman Law is changed, and that a vendee is at once entitled to have his contract annulled, on discovery that the seller could not make him the rightful owner.⁴

¹ Code, Nap. 1599.

² Toullier, Cont. de Vente, Vol. 14, n. 240.

³ Sirey, Vol. 32, pt. 1, p. 623; Dalloz, Vol. 32, pt. 1, p. 54.

⁴ Duranton, Cours de Droit Français, Vol. 16. Du Contrat de Vente, § 176, 177. Duvergier, Droit Civil Français, Vol. 1. De la Vente, § 17. Delvincourt, Cours de Code Civil, Vol. 2, Liv. iii., tit. 5, p. 117. Fremery, tudes du Droit Commercial, p. 5. He thus admirably expresses himself: "Les fragmens qui sont conservés au Digeste prouvent, jusqu'à l'évidence, que la coutume avait consacré à Rome une formule habituelle pour les contrats de vente, sauf les clauses spéciales que, suivant l'occurrence, il fallait y ajouter. Dans cette formule, c'était le vendeur qui parlait, *legem dicebat*. La coutume était d'employer, dans cette formule, pour exprimer l'engagement que le vendeur entendait contracter, ces mots: *præstare emptori rem habere licere*: ces termes, dans leur sens rigoureux, sont moins étendus que l'expression *rem dare*. Les jurisconsultes ont décidé, d'après ces données, que toute clause ambiguë devait s'interpréter contre le vendeur, qui est en faute de ne s'être pas expliqué plus clairement; ils ont décidé, en outre, que son engagement n'emportait pas l'obligation de transférer la propriété.

§ 368. Secondly. When an examination of manufactured goods is, from their nature or situation at the time of the sale, impracticable, a warranty will be implied that they are merchantable. Thus, if goods be at sea, or have not arrived, or are stowed in the hold of a ship, or in a storehouse, so that only the surface can be seen ; or if they be in bales, so that an examination of the centre cannot be made without tearing each

“ Justinien a transporté ces décisions dans son Digeste et les a érigées en loi ; en sorte que, tirant leur force du caractère de loi, et non des circonstances particulières du fait d’après lesquelles les jurisconsultes avaient raisonné, elles s’appliquent à tout contrat de vente par la nature que la loi lui reconnaît. Si donc la vieille formule est abandonnée, si le vendeur se sert des mots *rem dare*, et non plus de ceux-ci, *rem habere licere*, comment expliquera-t-on une loi qui déclare que le vendeur ne s’oblige pas à transférer la propriété ? Et si, n’employant ni l’une ni l’autre locution, il se borne à dire : *je vends*, et s’en réfère à la coutume pour expliquer le sens qu’elle a fini par attribuer à ce mot ; que fera-t-on quand il sera constant que tous ceux qui emploient ce terme, y attachent l’idée que le vendeur s’oblige à transférer la propriété ?

“ C’est précisément ce qui est advenu. Depuis bien des siècles, on enseigne dans nos écoles qu’il est de la nature du contrat de vente que le vendeur ne s’oblige point à rendre l’acheteur propriétaire : *ipse dixit* ! Et cependant, depuis bien des siècles aussi, le mot : *je vends*, n’est plus paraphrasé dans la formule romaine, qui en déterminait le sens ; quiconque le prononce ou l’entend, comprend sans hésiter que celui qui vend, doit rendre l’acheteur propriétaire ; et chacun se demande comment il se fait que, par la nature du contrat de vente, le vendeur ne soit point engagé à faire passer la propriété à l’acheteur.

“ Toutefois, depuis que le Code civil a paru, et a déclaré, article 1599 : ‘ la vente de la chose d’autrui est nulle,’ plusieurs personnes ont pensé que, si la vente de la chose d’autrui est nulle, c’est donc que les deux parties doivent avoir l’intention commune, l’une de conférer, l’autre d’acquérir la propriété de la chose vendue ; en sorte que la nature du contrat de vente, qui, en droit romain, n’imposait pas au vendeur l’obligation de rendre l’acheteur propriétaire, en droit Français, au contraire, comprendrait aujourd’hui cette obligation.” See, also, even before the Code, the similar opinion of Denizart, Vol. 9, vo. Garantie ; and of Argou, Inst. au Droit Français, Liv. 3, ch. 23, against that of Pothier, Contrat de Vente, § 98. See, also, for the Scottish Law, Erskine’s Inst. Book iii. tit. 3, § 4.

bale to pieces, — the seller will be understood to warrant them to be merchantable, and of the quality demanded and expected by the buyer.¹ Thus, where the defendant sold twelve bags of waste silk at 10s. 6d. per pound, which, on its arrival, was found to be of a quality not salable under the denomination of waste silk, — Lord Ellenborough said, “The purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor*

¹ Gardner v. Gray, 4 Camp. R. 144 ; Fisher v. Samuda, 1 Camp. R. 190 ; Laing v. Fidgeon, 6 Taunt. R. 108 ; Okell v. Smith, 1 Stark. R. 108 ; Bluett v. Osborne, 1 Stark. R. 384 ; Gray v. Cox, 4 Barn. & Cres. 108 ; Yeates v. Pym, 2 Marsh. R. 141 ; 3 Black. Comm. 161. In Gardiner v. Gray, Lord Ellenborough said, that a warranty, that goods sold are merchantable, would be implied “where there was no opportunity to examine.” So, also, these words are cited and affirmed in Wright v. Hart, 18 Wend. R. 456, and in Gallagher v. Waring, 9 Wend. R. 20 ; Osgood v. Lewis, 2 Harr. & Gill, 495. In Hyatt v. Boyle, 5 Gill & Johns. 110, the warranty of merchantable is limited to cases where an examination is “impracticable,” and the mere fact of labor or inconvenience is not considered as equivalent to impracticability. This limitation is recognized in Hart v. Wright, 17 Wend. R. 267. See, also, Loomis v. Cromwell, 8 Law Reporter, 546. Despite these cases, however, the old doctrine of *caveat emptor* is now established in the State of New York. See Wright v. Hart, 18 Wend. R. 456 ; 2 Kent, Comm. Lect. 39, p. 479, note (b) ; Defreeze v. Trumper, 1 Johns. R. 274 ; Swett v. Colgate, 20 Johns. R. 196 ; Waring v. Mason, 18 Wend. R. 425. The doctrine of the Common Law, is, however, denied in the late English case of Jones v. Bright, 5 Bing. R. 535, and the bearing of all the later cases is in favor of the doctrine in the text. In Jones v. Bright, Mr. Ch. J. Best said, “If a man sells an article, he thereby warrants that it is merchantable, that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose, and no case has decided otherwise, although there are, doubtless, some *dicta* to the contrary.” See, also, Brown v. Edgington, 2 Mann. & Grang. 279 ; Chanter v. Hopkins, 4 Mees. & Welsb. 399 ; Hastings v. Lovering, 2 Pick. R. 219, 220, note ; Holcombe v. Hewson, 2 Camp. R. 391 ; Salisbury v. Stainer, 19 Wend. R. 159 ; Oneida Manuf. Co. v. Lawrence, 4 Cowen, R. 444 ; Rose v. Beattie, 2 Nott & McCord, R. 538.

does not apply. He cannot, without a warranty, insist, that it shall be of any particular quality or fineness ; but the intention of both parties must be taken to be, that it shall be *salable* in the market under the denomination mentioned in the contract between them.”¹ So, also, where A ordered of B 48 saddles, for 24s. to 26s. per saddle, and the saddles delivered were unmerchable ; it was held, that, although there was no express contract that the articles should be merchantable, it resulted from the whole transaction, that the article was to be merchantable.² This warranty is still more authoritatively presumed in cases where the seller is the manufacturer ; but it is not restricted in its operation to such cases, and applies to any vendor, whether he manufacture the article sold or not.³

§ 369. But where the whole of the goods are completely open to the examination of the buyer, and are examined by him, and the seller is not a manufacturer, and does not know of the purpose to which they are intended to be applied, and makes no warranty or representation of fitness, he is not understood to assume a responsibility for any defect in the goods, whether it be latent or patent ; for the law will not protect a purchaser from the consequences of his own folly and carelessness where he has solely trusted to his own judgment, if the other party has not undertaken to supply an article of a particular quality or nature, and has done nothing to mislead him. Where a man can examine the goods, if he choose, and especially where he does examine them, he must take the consequences, if, through carelessness or negligence, he omit to

¹ Gardner v. Gray, 4 Camp. R. 141.

² Laing v. Fidgeon, 6 Camp. R. 110. In this case the goods did not correspond to a sample which was given ; but the case was not decided on the ground that it was a sale by sample.

³ Jones v. Bright, 5 Bing. R. 535 ; S. C. 1 Dan. & Lloyd, 304 ; Brown v. Edginton, 2 Mann. & Grang. 290, 291. See, also, Misner v. Granger, 4 Gilman, R. 69.

make a thorough examination. Thus, where the defendant purchased a number of "old potash kettles," for the purpose of melting and making into stove castings, and upon breaking up the kettles only one half of the iron, by weight, was found to be suitable for such purpose, it was held, that as the plaintiff was guilty of no misrepresentation, and was in fact ignorant of any defect in the iron, and the purchaser having had ample opportunity to examine it, no implied warranty as to its quality arose, and the maxim of *caveat emptor* applied.¹ So, where a bowsprit was sold, which was examined by the buyer, and was apparently sound, but which proved afterwards to be worthless and rotten, the seller was held not to be liable,² on the ground that the buyer had chosen to exercise his own judgment and to rely thereupon, and the seller had been guilty of no improper representation or concealment. But, if he cannot examine them, — as, if he order them from a distance; or if they be so placed as to render an examination impracticable, he must of course trust to the seller; and the seller, by undertaking to comply with his order, or by furnishing him with goods in answer to his demand, virtually affirms them to be such as have been ordered or demanded. And, as he occasions the injury, he ought fairly to incur the loss.

§ 370. The old doctrine, that a sound price of itself implied a warranty, was exploded by Lord Mansfield, whose decision has been recognized in all the subsequent cases.³ Indeed, to allow such a rule would be totally to subvert the doctrine of *caveat emptor* in every case; and, however the application of this maxim may have been restricted and modified by the late

¹ *Stevens v. Smith*, 21 Vermt. (6 Washburn,) R. 90.

² *Bluett v. Osborne*, 1 Stark. N. P. C. 384.

³ *Steuart v. Wilkins*, Doug. R. 20; *Parkinson v. Lee*, 2 East, R. 314; *La Neuville v. Nourse*, 3 Camp. R. 351; *Deal v. Mason*, 4 Conn. R. 428; *Mixer v. Coburn*, 11 Metcalf, R. 559.

cases, it certainly has never been abandoned. In some of the States in the United States, this doctrine, that a sound price implies a warranty of soundness, has, however, been adopted, in opposition to the whole weight of authority.¹

§ 371. Thirdly. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as an article of such a kind can be.² This species of warranty is distinguished from that last mentioned, in that the goods sold are either not in existence, or are to be procured for the vendee, and are not selected or specifically designated by him.³ If a purchaser select a particular

¹ This is the case in North and South Carolina. *Missroon v. Waldo*, 2 Nott & McCord, 76; *Barnard v. Yates*, 1 Nott & McCord, 142; *Timrod v. Shoolbred*, 1 Bay, R. 324; *The State v. Gaillard*, 2 Bay, R. 19, 380; *Crawford v. Wilson*, 2 Rep. Const. U. S. 353; *Gailbraith v. White*, Haywood, R. 461.

² *Jones v. Bright*, 5 Bing. R. 535; S. C. 1 Dan. & Lloyd, 304; *Gowen v. Von Dedalzen*, 4 Scott, R. 460, 3 Bing, N. C. 717; *Brown v. Edgington*, 2 Mann. & Grang. 279; S. C. 2 Scott, N. R. 496; *Shepherd v. Pybus*, 4 Scott, N. R. 431; *Gray v. Cox*, 6 Dowl. & Ryl. 200; S. C. 4 Barn. & Cres. 108; 5 Barn. & Cres. 458; *Laing v. Fidgeon*, 6 Taunt. R. 108; S. C. 4 Camp. R. 169; *Boyd v. Crawford*, Addison, R. 150; *Taylor v. Sands*, 5 Johns. R. 403; *Smalle v. Marrable*, 11 Mees. & Welsb. 5; *Freman v. Clute*, 3 Barb. Sup. Ct. R. 425; *Brenton v. Davis*, 8 Blackf. R. 317; *Misner v. Granger*, 4 Gilman, R. 69.

³ In *Howard v. Hoey*, 23 Wend. R. 350, the Court thus distinguishes between executed and executory contracts of sale in respect to the implied warranty. "Where a contract," says Bronson, Ch. J., "is executory, or, in other words, to deliver an article not defined at the time, on a future day, whether the vendor have an article of the kind on hand, or it is afterwards to be procured or manufactured, the promisee cannot be compelled to put up satisfied with an inferior commodity. The contract always carries an obligation that it shall be at least merchantable — at least of medium quality or goodness. If it come short of this, it may be returned, after the vendee has had a reasonable time to inspect it." See, also, *Moses v. Mead*, 1 Denio, R. 378, where this case is recognized.

article, trusting to his own judgment, he cannot afterwards hold the vendor responsible, on the ground that it turns out to be unfit for the purpose for which it was designed, because the skill and judgment of the vendor are not relied upon; but, if he relies upon the judgment of the seller, and informs him of the use to which it is to be applied, the vendor impliedly undertakes to furnish an article fit and proper for such use.¹ And a similar rule would apply as to a mechanic or artisan who is employed to perform certain labor, or to manufacture an article, and who is understood to agree to do his work in a workmanlike manner, and who, if he perform it negligently or improperly, is responsible to his employer in damages, — *spondet peritiam artis*.² Nor is there in this respect any distinction between a vendor who is a manufacturer, and a vendor who merely undertakes to supply an article, either by getting it made, or by procuring it otherwise.³ For the manufacturer has it within his power to render the article fit for such purpose, by the mode of manufacture and by the care which he is bound to bestow on it, — and the seller, who undertakes to procure articles for a specific purpose, has it equally in his power to procure those which are fit and proper. The same trust is reposed in both. But in the case of a direct purchase, no trust is necessarily reposed in the vendor, where an ample opportunity of examination is afforded; and, where no such opportunity is given, an implied warranty, as we have seen,⁴ arises. Where, there-

¹ Ibid. See, also, *Carnochan v. Gould*, 1 Bailey, R. 75; *Brenton v. Davis*, 8 Blackf. R. 317.

² Story on Bailments, § 431, 436; *Coggs v. Bernard*, 2 Ld. Raym. R. 909; *Moneypenny v. Hartland*, 1 Car. & Payne, 352; S. C. 2 Car. & Payne, 378; *Pothier, Contrat de Louage*, n. 425; 1 Bell, Comm. 456, (5th ed.); *Duncan v. Blundel*, 3 Stark. R. 6; 3 Kent. Comm. Lect. 40, p. 588; Dig. Lib. 50, tit. 17, l. 132; Lib. 4, tit. 9, l. 5; Lib. 19, tit. 2, l. 9, § 5; *Pothier, Pand. Lib.* 19, tit. 2, n. 29.

³ *Brown v. Edgington*, 2 Mann. & Grang. 290, 291.

⁴ Ante § 368.

fore, copper sheathing was ordered for the purpose of sheathing a vessel, and the sellers were to manufacture it, and it proved to be wholly worthless for such a use, it was held, that although no fraud was imputable to the vendors, yet that, as the vendors knew that it was to be applied to the purpose of sheathing a vessel, a warranty was implied on their part that it was fit for such purpose.¹ So, where A ordered a crane rope of B,

¹ *Jones v. Bright*, 5 Bing. R. 533 ; S. C. 3 Moore & Payne, 155. In this case, Best, Ch. J., said : “ It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud ; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase ; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied. The Court must decide with a view to such rules, although, upon the present occasion, no fraud has been practised by the parties calling for decision. This is an action against the defendants to recover damages for the insufficiency of certain copper which they furnished for a particular purpose. It has been asserted that the invoice is the only evidence of such a contract, and that the defendants ought not to be bound by a loose conversation at the time of the sale. An invoice, however, is frequently not sent till long after the contract is completed, and is altogether unlike a broker’s note which does contain the contract between the parties ; but if we look at the invoice alone, we see in the present case that the copper was expressly for the ship *Isabella*. However, I do not narrow my judgment to that, but think, on the authority of a case not cited at the bar, *Kain v. Old*, 2 B. & C. 634, that, ‘ where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination.’ In that doctrine I entirely concur. Whatever, then, was not previous discussion, but formed part of the contract, may be taken into consideration. In a contract of this kind, it is not necessary that the seller should say, ‘ I warrant ; ’ it is enough if he says that the article which he sells is fit for a particular purpose. Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said : ‘ Mr. Jones is in want of copper for sheathing a vessel ; ’ and one of the defendants answered, ‘ We will supply him well.’ As there was no subsequent communication, that constituted a contract, and amounted to a warranty. But I wish to put the case on a broad principle : — If a man sells an article, he thereby warrants that it is merchantable, — that it is fit

informing him that it was wanted to raise pipes of wine from the cellar, and B thereupon undertook to procure it, but the

for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise, although there are, doubtless, some *dicta* to the contrary. Reference has been made to cases on warranties of horses; but there is a great difference between contracts for horses and a warranty of a manufactured article. No prudence can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen; and this distinction explains the case of *Bluett v. Osborn*, in which Lord Ellenborough held that the defendant, who had sold a bow-sprit, was not responsible for a failure arising out of a latent defect in the timber. The decisions, however, touching the sale of horses, turn on the same principle. If a man sells a horse generally, he warrants no more than that it is a horse; the buyer puts no question, and perhaps gets the animal the cheaper. But if he asks for a carriage horse, or a horse to carry a female, or a timid and infirm rider, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that it is fit for the purpose indicated. The selling, upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities. So, it has been decided, if beer be sold to be consumed at Gibraltar, the sale is an affirmation that it is fit to go so far. Whether or not an article has been sold for a particular purpose, is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. As to the puffs to which allusion has been made, the Court has no wish to encourage them; they are mere traps for buyers; and if a case were to arise out of a contract made under such circumstances, and it were shown that the article puffed was of inferior quality, when asserted to be of the best materials and workmanship, the seller would be bound to take it back, or make compensation in damages. These principles decide the present case in favor of the plaintiff. After what Lord Tenterden had said in *Gray v. Cox*, I declined expressing an opinion at Nisi Prius; but I expected the Jury would have found that the article was not properly manufactured, for the testimony of the scientific witnesses was very clear; and though the conduct of the defendants was most upright, the article they sold had certainly suffered in the manufacture. At all events, the warranty given by them is not satisfied, because the jury find that there is an intrinsic defect in an article manufactured by them. Old cases have been cited; and *Chandelor v. Lopus*, at the head of them; but that does not bear on the

rope which he furnished was unfit for such purpose ; it was held that a warranty was implied from the contract, that the rope was fit and proper for the purpose for which it was intended, and that the fact that the vendor was not the manufacturer, made no difference in his liability.¹

question, because all that the Court decided is, that to render the defendants liable, there must be a warranty or a false representation. But the case does not decide there must be an express warranty ; an implied warranty would satisfy the terms of the decision. Here there has been, in my opinion, an express warranty. The most material case is *Parkinson v. Lee* ; but the point was not decided there ; the Court only decided that a warranty, that hops sold should be equal to sample, was satisfied by showing that they were equal to sample, although not perfectly good and merchantable. Then, the defect complained of was in a product of nature, not of human art, and was unknown to the sellers. That case too, was decided in 1802, and Gibbs C. J., cannot be supposed to have been unacquainted with it, when he decided *Laing v. Fidgeon*, in 1815 ; yet he there decided the point now in dispute, that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods should be merchantable. The law, then, resolves itself into this : — that if a man sells generally, he undertakes that the article sold is fit for *some* purpose ; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose. In the present case the copper was sold for the purpose of sheathing a ship, and was not fit for that purpose ; the verdict for the plaintiff, therefore, must stand ; the case is of great importance ; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.”

¹ *Brown v. Edgington*, 2 Mann. and Grang. 279, 290, 292 ; S. C. 2 Scott, N. R. 496. In this case, Ch. Justice Tindall said : “ It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required ; but if he relies upon the judgment of the seller and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed. In the present case the facts are free from all doubt. The plaintiff sends to the defendant’s shop for a crane rope ; whereupon the foreman of the defendant goes to the plaintiff’s premises to

§ 372. But, where an article of a certain and definite nature is to be manufactured to order, the seller of course can in no

ascertain the dimensions of the rope required, and is shown the crane, and is told that the rope is wanted for the purpose of raising pipes of wine from the cellar. The rope is made, and is fixed to the crane by a servant of the defendant. Upon this state of facts, it has been contended on the part of the defendant that no warranty can be implied, inasmuch as the defendant was not the actual manufacturer of the rope. I cannot, myself, see any great distinction between a manufacturer and a party who undertakes to get an article made; but in the present case, I think the defendant must be taken to be the manufacturer. The evidence is, that he sent the order to be executed by a rope-maker of the name of Dunn. Can it make any difference with respect to his legal liability, whether the rope was made on his own premises, or by a person whom he employs as his manufacturer? This is a stronger case than *Jones v. Bright*; here, the attention of the defendant was distinctly called to the purpose to which the article was to be applied. I do not think that any great weight is to be given to the argument of the hardship of holding the defendant responsible; for it was his own fault that he did not inform the person whom he ordered to make the rope, of the use to which it was to be applied. His want of a remedy over against the manufacturer from this circumstance, ought not to prevent him from being held liable to the plaintiff." Mr. Justice Erskine said: "I also am of opinion that this rule should be discharged. The question is, whether the evidence showed that the rope was supplied under a contract which implied a warranty, that the rope was fit and proper for the purpose for which it was required. It appears that at the time the order was given, the rope was not in existence, and that the defendant was made acquainted with the use for which it was wanted. When a party undertakes to supply an article for any particular purpose, he warrants that it shall be fit and proper for such purpose. If a purchaser himself selects the article, it has been held that the mere fact that the vendor knows the use for which it is designed, will not raise an implied warranty, because the skill and judgment of the latter are not relied on in making the purchase. In this case not only was the defendant's foreman told the purpose for which the rope was required, but after being so told, he undertook to supply the rope, and said that it must be made. It has been contended, that no warranty can be implied unless the seller be also the manufacturer. It is true that in *Jones v. Bright*, the vendors were the manufacturers; and that fact was alleged in the declaration, and some stress laid upon it by the judges in their judgments. But it does not follow, because the Court attaches some weight to a fact which clearly makes a party liable, that such fact is a necessary ingredient in the

sense be considered as warranting it to be appropriate to the use to which the buyer intends to apply it, whether the seller be informed of such intention or not; but only as warranting it to be as fit as any similar article answering to the order, can reasonably be expected to be.¹ That is, the seller does not undertake to warrant the good judgment of the buyer, but only the fitness of the article, as far as its quality, and not its nature, is concerned. Thus, where the plaintiff was the patentee and manufacturer of a patent machine for printing two colors, and the defendant, having seen one of the machines on the plaintiff's premises, ordered one, the plaintiff undertaking by a written memorandum to make "a two color printing machine on my patent principle," and in an action for the price, the defendant excused himself from liability, on the ground, that the machine had been found useless for printing in two colors; it was held, that, if the machine described was a known, ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not; but that, if it were not a known, ascertained article, and the defendant had merely agreed to supply a machine for printing two colors, the defendant was not liable, unless the instrument was reasonably fit for such purpose.² So, also, where an article was ordered of the manufacturer, under the designation of "Chanter's smoke-consuming furnace," to be used in the defendant's brewery, and it was found on trial not to be adapted for such a use, although it operated in its customary manner, there being no fraud, it was held, that the

case. Here, the defendant did not make the rope, but he selected a person to make it, and had an opportunity of informing him of the purpose for which the article was wanted. If he did not do so, it was his own fault. Having undertaken to supply a rope for the plaintiff's crane, he is clearly liable to this action, the jury having found that it was not a fit rope for that purpose."

¹ Chanter v. Hopkins, 4 Mees. & Welsb. 399; Ollivant v. Bayley, 5 Adolph. & Ell. 289.

² Ollivant v. Bayley, 5 Adolph. & Ell. 289.

seller could not be understood to warrant that the furnace was adapted to the use for which it was intended, inasmuch as it was a specific and definite article, and as good for the purpose as any answering the description in the order.¹

§ 373. Under this head, also, is included the implied warranty, which is raised in the sale of provisions, that they are sound and wholesome; on the ground, that such a warranty is necessary for the preservation of health and life.² This rule, however, has been held not to apply to the case of a sale of provisions packed, inspected and prepared for exportation, *as merchandise*, where there was only a warranty, that the provisions were of a particular brand, and where they were not wholly unmerchantable.³

¹ *Chanter v. Hopkins*, 4 Mees. & Welsb. 399.

² 3 Black. Comm. 165; *Von Bracklin v. Fonda*, 12 Johns. R. 468; *Osgood v. Lewis*, 2 Harr. & Gill, 495; *Winsor v. Lombard*, 18 Pick. R. 57. Year Book, 9 Henry VI. 53; *Rosure v. Vaughan*, Cro. Jac. 197; *Keilway*, R. 91; 1 Roll. Abr. tit. Action sur Case, (P.) pl. 1 & 2. See cases collected in 1 Viner, Abr. 561. But see *Burnby v. Bollett*, 16 Mees. & Welsb. 644, where it is held, that this warranty is only implied in cases where provisions are sold by general dealers, where it is their habit and trade to sell provisions, such as victuallers, taverners, butchers, &c., and does not apply to other persons except in case of fraud, or when the seller knows the article not to be good.

³ *Winsor v. Lombard*, 18 Pick. R. 57. 'In this case Mr. Ch. Justice Shaw said, "In a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions, packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor, but both rely upon the skill and responsibility of the inspector, as verified by the brand, for all qualities which the brand indicates; and for damage which may happen afterwards, and against which,

§ 374. Fourthly. A warranty will be implied against all *latent* defects in two cases. 1st. When the seller knew that the buyer did not rely on his own judgment but on that of the seller, who knew, or might have known, the existence of the defects. This exception to the general rule is allowed on the ground, that the seller in such a case is guilty of a constructive fraud, and, however unintentionally, does nevertheless actually mislead the vendee to his injury.¹ If, however, the buyer do not rely on the seller, and the seller be not aware of the exist-

therefore, the brand offers no security, the vendee must secure himself by the terms of the contract; and unless he does so, or unless he is deceived by a false representation of the present and actual condition of the commodity, on which he would have a remedy of a different character, he must be supposed to have been content to take the risk on himself." See, also, *Moses v. Mead*, 5 Denio, R. 617.

¹ See Ante, § 169; *Schneider v. Heath*, 3 Camp. R. 506; *Baglehole v. Walters*, 3 Camp. R. 154. This is especially the case in Equity. See *Hough v. Richardson*, 3 Story, R. 690; *Doggett v. Emerson*, 3 Story, R. 732. In this case Mr. Justice Story said, "It appears to me, that it is high time that the principles of Courts of Equity upon the subject of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should, literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain. And I cannot but believe, if this doctrine of law had been steadfastly kept in view, and fairly upheld by public opinion, the various speculations which have been so sad a reproach to our country, would have been greatly averted, if not entirely suppressed, by its salutary operation."

ence of a latent defect, and do no act, and say no word in relation to the article sold, which has a tendency to mislead the purchaser, the rule of *caveat emptor* would apply. He must, however, be very careful not to do or say any thing calculated in the slightest degree to mislead the vendor, or the contract will not be binding.¹ But in cases where the defect is latent, and such that the vendee could not by the closest and strictest attention detect it, he is always understood to rely upon the openness of the seller, and if the seller, knowing of the existence of such latent defect, do not disclose it, such a concealment is considered as a fraud, which annuls the contract.² Thus, in the sale of a ship, which had a latent defect known to the seller, and which was of such a nature that the buyer could not, by the closest examination, have discovered it, the seller was held to be guilty of fraud in concealing it.³ If, however, the seller sell the subject-matter under a proviso, that he sells it "with all faults," he will not be liable for any latent defects, whether he knew of their existence or not; unless, indeed, he use some artifice to disguise them, or to prevent the buyer from discovering them, or be guilty of misrepresentation. For such a stipulation is equivalent to a notification to the buyer, that he will not subject himself to any liability for any defects.⁴ The stipulation, "with all faults," is, however, always interpreted to mean only such faults as an article may have consistently with

¹ See Ante, § 165 to 174; 2 Kent, Comm. Lect. 59, p. 490.

² *Mellish v. Motteaux*, Peake, Cas. 115; *Baglehole v. Walters*, 3 Camp. R. 154; *Schneider v. Heath*, 3 Camp. R. 506; *Bywater v. Richardson*, 1 Ad. & Ell. 508; S. C. 3 Nev. & Man. 752; 2 Kent, Comm. Lect. 39, p. 490.

³ *Mellish v. Motteaux*, Peake, Cas. 115.

⁴ *Schneider v. Heath*, 3 Camp. R. 506; *Baglehole v. Walters*, 3 Camp. R. 154; Lord Kenyon, however, in *Mellish v. Motteaux*, (Peake's Cas.) held a different opinion, and decided, that a seller was bound to disclose all latent defects which he knew, whether he sold the article subject to all faults or not. His decision was overruled by Lord Ellenborough, in 3 Camp. R. 154, and by Lord Mansfield, in 3 Camp. R. 506. His opinion, neverthe-

its being the thing described, — as, where a ship was advertised and sold as a “copper-fastened vessel, to be taken with all faults, without allowance for any defects whatsoever,” and she proved not to be copper-fastened ; it was held, that the vendor was liable for a breach of the warranty.¹

§ 375. The second class of cases, in which a warranty is implied against latent defects, is where, from the situation of the parties, the seller might have provided against the existence of any such defects, or, where a warranty against them is implied in the very nature of the transactions, — as, in the case of a manufacturer, or producer, who undertakes to furnish articles of his manufacture, or produce, in answer to an order. The ground of this warranty is the implied trust and confidence, necessarily reposed in such cases in the vendor by the vendee, with the tacit consent of the former.²

§ 376. Fifthly. The next exception is where goods are sold by sample ; in which case, a warranty is implied, that the bulk corresponds to the sample in nature and quality. The exhibition of a sample is equivalent to an affirmation, that all the goods sold by it are similar ; and, if they be not, the ven-

less, seems to us to rest on the best principle ; for, whether the seller sold “with all faults” or not, the wilful concealment by him of a fact, going to the very essence of the contract, under circumstances which forced the buyer to rely upon his good faith, was a gross fraud in every sense of the term. If the seller knew that the article sold had a latent defect, and he knew that it was impossible for the buyer to discover it, it was a positive deceit practised under circumstances which absolutely necessitated a trust on the part of the buyer. The sale “with all faults,” ought fairly to be interpreted to mean, all faults not known to the vendor, and not designedly concealed by him, or which he might have discovered.

¹ *Shepherd v. Kain*, 5 Barn. & Ald. 240.

² *Jones v. Bright*, 5 Bing. R. 533 ; *S. C.* 3 Moore & Payne, 155 ; *Brown v. Edgington*, 2 Mann. & Grang. 290 ; *Ante*, § 371, 372.

dee may rescind the contract.¹ But the mere exhibition, at the time of the sale, of a specimen of the goods sold, will not of itself constitute a sale by sample so as to subject the seller to liability on his implied warranty, because such specimen may only be shown to enable the purchaser to form an opinion of its probable qualities without any intention on the part of the seller to warrant all the goods sold to be equal to it. And where there is an opportunity for a personal examination of the bulk, it is a strong circumstance against considering the sale to have been made by sample.² So, also, where, upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal value, if there be a sale note or written memorandum of the contract, which does not refer to the sample, it is not a sale by sample, since the sale note or memorandum is considered to be the best evidence of the actual terms of the sale finally agreed upon by the parties. In such a case, if the goods should turn out to be of an inferior quality, the purchaser's remedy is by action on the case for a deceitful representation.³ So, also, where a lot of goods in bales is sold, and no one is offered as a sample, and the purchaser having power to examine all, chooses only to examine one, he cannot claim that the sale was by sample.⁴ Yet, if the contract be not in writing, and a sample be shown at the time of the sale, and be referred to in

¹ *Lorymer v. Smith*, 1 Barn. & Cres. 1 ; *S. C.* 2 Dowl. & Ryl. 23 ; *Hibbert v. Shee*, 1 Camp. R. 113 ; *Parkinson v. Lee*, 2 East, R. 314 ; *Beebee v. Robert*, 12 Wend. R. 413 ; *Boorman v. Johnston*, 12 Wend. R. 566 ; *Gallagher v. Waring*, 9 Wend. R. 20 ; *Williams v. Spafford*, 8 Pick. R. 250 ; *Bradford v. Manly*, 13 Mass. R. 139 ; *Parker v. Palmer*, 4 Barn. & Ald. 387 ; *Burne v. Lord*, 2 Sandf. Sup. Ct. R. 89.

² *Burne v. Lord*, 2 Sandf. Sup. Ct. R. 89.

³ *Meyer v. Everth*, 4 Camp. R. 22. See, also, *Vandervoort v. Col. Ins. Co.*, 2 Caines, 161 ; *Mumford v. McPherson*, 1 Johns. R. 414 ; *Pickering v. Dowson*, 4 Taunt. R. 779 ; *Loomis v. Cromwell*, 8 Law Rep. 546 ; *Ontario Common Pleas*, New York, Feb. 1846.

⁴ *Salisbury v. Stainer*, 19 Wend. R. 159.

the course of the negotiation as inducement to the bargain, the sale will be a sale by sample.¹

§ 376 *a*. In such cases, if from the mode of packing, a portion of an article only can be seen, and it be shown by the vendor, the sale will often be treated as a sale by sample. And this seems to be the most reasonable way of construing such a contract. Thus, as packed cotton can only be examined on the exterior, and by plucking portions of it as samples of the interior, it has been treated as a sale by sample.²

§ 377. There is a class of cases which it may be well to notice in this connection, and which are usually included under the head of implied warranty, but to which the doctrine of warranty does not properly seem to be applicable. The cases referred to occur where the article actually sold entirely differs in kind from that which was contracted for ; that is, where the parties suppose themselves to be buying and selling one thing, when, in point of fact, they are contracting for the purchase and sale of an entirely different thing. As, where an article was sold as "waste silk,"³ which did not answer to such a description ; or where something was bought as "scarlet cuttings," which were not scarlet cuttings ;⁴ or where a stone was sold as a bezoar stone, which was no such stone ;⁵ or where a

¹ *Gardner v. Gray*, 4 Camp. R. 144 ; *Brown on Sales*, 472 ; *Long on Sales*, 192 (Rand's ed.) ; *Meyer v. Everth*, 4 Camp. R. 22.

² *Oneida Manuf. Co v. Lawrence*, 4 Cowen, R. 444 ; *Rose v. Beattie*, 2 Nott & McCord, R. 538.

³ *Gardner v. Gray*, 4 Camp. R. 144.

⁴ *Bridge v. Waine*, 1 Stark. N. P. C. 504. See, also, *Shepherd v. Kain*, 5 Barn. & Ald. 240.

⁵ *Chandelor v. Lopes*, Cro. Jac. 4. This case was probably decided on the ground that there was no sufficient allegation of fraud in the pleadings. Though it seems to us that the opinion of Anderson, J., is entitled to more weight than that of the other judges. He held, that the deceit in selling

package of old leather and bones was sold as a "seroon of indigo."¹ In all these cases, if there be fraud, fraud is the foundation of the seller's liability. If there be no fraud, but an express warranty, the warranty is the material thing upon which the right of the vendee to recover is founded. But where there is neither fraud nor an express warranty, the case seems to be one of pure mistake in respect to the subject-matter,—and mistake is properly the ground of the seller's liability. But it does not seem that the doctrine of implied warranty would properly apply, or is at all necessary to found a right of recovery in the vendee; and although, in such cases, upon the ground of an implied warranty, the plaintiff might be entitled, in many cases, to recover, yet in others he might not,—for, in matters of pure mistake, the doctrine of *caveat emptor* would not seem to apply. Cases, where there is a breach of implied warranty, are, where the article sold answers to the name under which it was sold, but is not of the proper quality. A vendor only warrants by implication the epithet or adjective, but not the substantive. At all events, whether these cases are considered as cases of fraud or mistake, or of implied warranty, the vendor is equally bound to furnish goods which correspond in species to his representation, and bear the name of the article supposed to be bought and sold.²

the stone as a bezoar, when it was not, was a sufficient cause of action. Had it not been for the necessity of bringing an action on the case, according to the practice at that time in such cases, is it not evident that the ground of mistake or of fraud would either of them have been conclusive? In *Morrill v. Wallace*, 9 New Hamp. R. 113, Parker, J., says, speaking of *Chandelor v. Lopus*, "This case, as stated by Coke, can hardly be regarded as authority in the present day. A report of the opinion of Mr. Justice Popham in that case, (Dyer, R. 75, note,) is more in accordance with recent decisions." See, also, *Borrekins v. Bevans*, 3 Rawle, R. 23.

¹ *Williams v. Spafford*, 8 Pick. R. 250. This was decided to be a sale by sample; but, as there was no fraud, but evident mistake, mistake would have been quite as good a legal ground for recovery. See, also, *Henshaw v. Robins*, 9 Metcalf, R. 83.

² *Henshaw v. Robins*, 9 Metcalf, R. 83. *Borrekins v. Bevan*, 3 Rawle, SALES.

§ 378. The last exception to the rule that a purchaser ordinarily buys at his own risk, is to be found in cases where the vendor has been guilty of fraudulent representation or concealment. The circumstances under which misrepresentation or concealment will operate to vitiate a contract of sale, have already formed a subject for discussion in a former part of this treatise, but it may be as well to restate the rules applicable thereto in the present connection.

§ 379. Fraud is so abhorrent to the law that it vitiates every contract, and gives to the party deceived the right to reject it, but it does not ordinarily enable the guilty party to take advantage thereof, to the injury of the innocent party.

§ 380. Every misrepresentation in respect to a fact, affording a material inducement to a sale, which operates actually to deceive the vendor, is a fraud which vitiates the sale. If the vendee be not actually deceived thereby, or if the misrepresentation be in respect to a trifling and immaterial fact; the contract will not thereby, as we have already seen, be rendered voidable.¹ So, also, as we have seen, the mere expression of judgment or opinion as to the value of the subject-matter, or an exaggerated estimate of its value, if made *bonâ fide*, in cases where no special confidence was placed in such opinions, will

R. 23. In this case, the court, after saying that *Chandelor v. Lopus*, Cro. Jac. 4, as well as the cases of *Scixas v. Wood*, 2 Caines, R. 48, and *Swett v. Colgate*, 20 Johns. R. 196, in which the contrary doctrine was held, must be abandoned, goes on to say, that "In all sales there is an implied warranty that the article corresponds in specie with the commodity sold, unless there are some facts and circumstances existing in the cases, of which the jury, under the direction of the court, are to judge, which clearly show that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased, or where he may waive his right." *Henderson v. Sevey*, 2 Greenleaf, R. 139; *Cornelius v. Molloy*, 7 Barr, R. 293.

¹ See Ante, § 166, for a full consideration of this subject.

not be such a misrepresentation as to avoid a contract of sale.¹ But, if there be any special relation of trust between the parties, or if the buyer be without other means of information, and be induced by the representations of the seller to forbear making inquiries, and be actually deceived, the contract will not be binding upon him. The only question, in such cases, is whether the vendee were actually deceived to his injury by any thing which the vendor either did or said in respect to the sale. If he were, the doctrine of *caveat emptor* does not apply.

§ 381. So, also, every concealment of defects, and every trick and artifice for the purpose of concealment, or of fraud, or surprise, operates to vitiate a contract of sale.² But mere concealment, where there is no special trust between the parties, and no legal or equitable obligation not to conceal, implied in the circumstances of the case, does not invalidate a sale,—for the law has considered, that it cannot undertake strictly to enforce all that is required by scrupulous honor.³ But if there be any relation of special trust, or if the circumstances imply an obligation on the part of the vendor to divulge all that he knows in respect to the subject-matter, any concealment by him is a fraud.⁴

¹ See Ante, § 169; *Trower v. Newcome*, 3 Meriv. R. 704; 2 Kent, Comm. Lect. 39, p. 484; *Pearson v. Morgan*, 2 Bro. Ch. R. 385; *Joice v. Taylor*, 6 G. & J. 54; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Laidlaw v. Organ*, 2 Wheat. R. 178; *James v. Morgan*, 1 Lev. R. 111; *Thornborow v. Whitacre*, 2 Ld. Raym. R. 1104.

² Story on Equity Jurisp. § 191, where this whole subject is fully and learnedly discussed. *Hill v. Gray*, 1 Stark. R. 434; *Trower v. Newcome*, 3 Meriv. R. 704.

³ 1 Story, Equity Jurisp. § 204, 205, 206; 2 Kent, Comm. Lect. 39, p. 481; *Pidcock v. Bishop*, 3 Barn. & Cres. 605; *Fox v. Mackreth*, 1 Bro. Ch. R. 420; *Laidlaw v. Organ*, 2 Wheat. R. 178; *Trower v. Newcome*, 3 Meriv. R. 704.

⁴ *Ibid.*; *Turner v. Harvey*, Jacobs, R. 178; *Pilling v. Armitage*, 12 Ves. R. 78.

§ 382. In this respect, however, a distinction obtains between the concealment of extrinsic facts bearing on the contract and operating as an inducement thereto, — such as the state of the market, — and the concealment of intrinsic qualities of the subject-matter, affecting its nature and condition, — such as natural defects. And in respect to extrinsic facts, the rule is, that neither party is ordinarily bound to make them known to the other, nor to answer any inquiries of the other in regard to them.¹ He must, however, be careful not to misrepresent, for that is a positive act, and he is only absolved from liability so long as his conduct is completely negative.² Thus, a man is not bound to disclose any knowledge he may have of the rise of the market, or of any accident by which the price of goods is enhanced; or of any extraneous fact with which he may have become acquainted. As, where the plaintiff, having private information of the treaty of peace, signed at Ghent, purchased of B a quantity of tobacco, without informing him of such fact, although B, at the time asked him if there were any news calculated to enhance the price of tobacco, to which it did not appear that he gave any answer; it was held, that he was not bound to communicate such fact in order to render the sale valid.³ But the purchaser must, in such a case, be very cautious not to do or say any thing positive, for, if the vendor be misled improperly in the smallest degree, the sale would not be binding.⁴ But in respect to *intrinsic* qualities, the rule is, that mere silence in respect to any defect which the vendor

¹ 2 Kent, Comm. Lect. 39, p. 478, 479; *Laidlaw v. Organ*, 2 Wheat. R. 178; *Calhoun v. Vechio*, 3 Wash. Circ. C. R. 165; *Blydenburgh v. Welsh*, Baldwin, C. C. R. 331. See Ante, § 175, 179.

² *Ibid.*; Ante, § 165 to 174, 179.

³ *Laidlaw v. Organ*, 2 Wheat. R. 178. Was he not bound, however, to answer, when the question was put to him, and did not this silence operate as a direct fraud? See Ante, § 104 to 180; 1 Story, Eq. Jurisp. § 208, 209; *Pothier de Vente*, n. 240; Post, § 396.

⁴ Kent, Comm. Lect. 39, p. 490; *Turner v. Harvey*, 1 Jacob, R. 169; Ante, § 179.

might, by proper caution, have discovered, and where the subject-matter of sale is open to his inspection, is not a fraud, unless a special trust and confidence be reposed in the vendor by the vendee, or grows out of the peculiar circumstances of the case. If, however, any artifice be employed to disguise the article sold, or to prevent a fair and thorough examination by the buyer, the sale is voidable. So, also, a concealment of any latent defect which could not have been discovered by the vendee, through the exercise of proper diligence, will avoid the contract; because it is a direct fraud on the purchaser not to inform him in a case where an implied trust is necessarily created by the circumstances.¹

§ 383. So, also, if a vendor should sell an estate and conceal the fact that there were incumbrances on it, of which the buyer was ignorant; or that he had no title; or should sell a house which he knew to be burned down; the sale would be fraudulent, and would be set aside in Equity; upon the ground that the purchase implied a trust, or confidence, on the part of the vendee, that no such defect existed, and silence would, on such a point, be equivalent to an assertion that he had a good title, — or that the house existed, — or that there were no incumbrances.²

§ 384. Again, there are some cases where it is the usage of trade for the vendor to make certain statements relative to the condition of the goods which he sells, — and in all such cases, a concealment in respect thereto operates as a fraud and vitiates

Mellish v. Motteaux, Peake's N. P. R. 115; *Baglehole v. Walters*, 3 Camp. R. 154; *Schneider v. Heath*, 3 Camp. R. 506; see note to *Oldfield v. Round*, 5 Ves. jr. R. 508; *Hough v. Richardson*, 3 Story, R. 690; *Doggett v. Emerson*, 3 Story, R. 732; *Daniel v. Mitchell*, 1 Story, R. 172.

² Story on Contracts, § 545; 1 Story, Eq. Jurisp. § 208, 209; *Arnot v. Biscoe*, 1 Ves. R. 95; *Pilling v. Armitage*, 13 Ves. R. 78; *Pothier de Vente*, n. 210.

the contract. Thus, where, in an action on the case for deceit in the sale of some pimento, the declaration alleged, that it was sold at auction as not sea-damaged, whereas in reality it was sea-damaged, and at the trial it was proved, that when sea-damaged pimento was sold at auction, it was the usage to state that it was so damaged, and that, if nothing were said with respect to its quality, it was understood to be sound, and as the seller in this case had been silent, it was held, that the action was maintainable.¹ Again, the rule as to concealment of extrinsic circumstances does not obtain in cases where the vendee, knowing that the vendor acts upon the presumption that a certain vital fact or inducement exists, which the buyer knows not to exist, does not put him right, — for in such a case concealment would be a positive fraud. Thus, if a man, knowing that he is insolvent and incapable of making payment, purchase goods of another, who is ignorant of any change in his circumstances, and sells them under the most implicit belief in the good faith and solvency of the buyer, the concealment of his insolvency would be a direct fraud on the seller, for which he could recover.²

§ 385. In all cases where the vendor has been guilty of fraudulent misrepresentation or concealment, in respect to the nature and quality of goods, it is only at the option of the vendee to reject the contract. And if, therefore, he make no objection, after discovering the deceit, but deal with the article as his own, or keep it for an unreasonable length of time, the contract will be considered to be ratified by him.³ And if, upon discovery of fraud, he still continue to deal with it as his own, he cannot, upon discovery of another incident in the same fraud, repudiate it.⁴

¹ *Jones v. Bowden*, 4 Taunt. R. 847.

² *Conyers v. Ennis*, 2 Mason, R. 239.

³ *Campbell v. Fleming*, 1 Adolph. & Ell. 40.

⁴ *Ibid.*

CHAPTER XIII.

DUTIES AND RIGHTS OF THE PARTIES TO A CONTRACT OF SALE.

§ 386. HAVING now followed the contract of sale through its different stages to its completion, the next question which naturally suggests itself for consideration is in respect to the remedies which either party may have on a breach of the contract. Before proceeding to consider the remedies, however, it may be as well briefly to recapitulate, and bring consecutively together, the duties of either party in every stage of the contract, since, although they have already been anticipated in various parts of this treatise, yet, as they form the key to all the remedies, they seem a proper introduction thereto.

§ 387. And, in the first place, as to the rights and duties of the vendor. The vendor is bound to transfer to the vendee a good *title* to the thing purchased ; and this he is able to do, not only in cases where he absolutely owns the thing, but where he has obtained a title by fraudulent means, with the assent of the owner to his assuming possession.¹ In such cases, although the party defrauded may reclaim the goods on proof of fraud, yet, while the other party holds them in possession, he can pass a good title thereto to a *bonâ fide* pur-

¹ Hollingsworth v. Napier, 3 Caines, Cas. 182 ; Mowrey v. Walsh, 8 Cowen ; R. 238 ; Trott v. Warren, 2 Fairf. R. 227 ; Wheelright v. Depyster, 1 Johns. R. 471 ; Cross v. Peters, 1 Greenl. R. 376 ; Conyers v. Ennis, 2 Mason, R. 236 ; Noble v. Adams, 7 Taunt. R. 59 ; Buffington v. Gerrish, 15 Mass. R. 156 ; Root v. French, 13 Wend. R. 570.

chaser for a valuable consideration, but to none other.¹ But, if the possession have been obtained by felony or by chance, the owner not having willingly surrendered possession, a valid title cannot be passed by the thief or the finder.² Again, when the vendor is neither a thief nor a finder, he can make a valid sale of goods to a *bonâ fide* purchaser, without notice, in cases where he has no title, if he be possessed of any legal type of title which is negotiable, — as, if he have a bill of lading, or a dock-warrant;³ or, where he is held out by the owner as being an agent duly authorized to sell; and these exceptions to the general rule are admitted in both of these cases, in view of public policy, and also because the indirect act of the owner has enabled the seller to deceive the purchaser.⁴ So, also, the vendor can make a good sale of creatures *feræ naturæ*, if he be possessed of a qualified property therein, *propter impotentiam*, — as, in the young of hawks, herons, or birds or creatures of any kind which build nests, or burrow in his land, while such young are too feeble to escape;⁵ or *per industriam*, — as, in creatures which he has caught, tamed, or confined;⁶ or *ratione soli*, —

¹ Ibid.; *Lloyd v. Brewster*, 4 Paige, Ch. R. 537.

² *Williams v. Merle*, 11 Wend. R. 80; *Everett v. Coffin*, 6 Wend. R. 609; *Kinder v. Shaw*, 2 Mass. R. 398; *Haretop v. Hoare*, 1 Wilson, R. 8; 2 *Strange*, R. 1187; *Wheelwright v. Depeyster*, 1 Johns. R. 471; *Dame v. Baldwin*, 8 Mass. R. 519; *Towne v. Collins*, 14 Mass. R. 500; *Mowrey v. Walsh*, 8 Cowen, R. 238; Ante, § 188, 200, 203.

³ *Miller v. Race*, Smith's Leading Cases, 259, and cases there cited; *Grant v. Vaughan*, 3 Burr. 1516; *Glynn v. Baker*, 13 East, R. 509; Ante, § 188, 203.

⁴ *Irving v. Motley*, 7 Bing. R. 543; S. C. 5 *Moore & Payne*, 380; *Barnes v. Bartlett*, 15 Pick. R. 71. See, also, Ante, § 202; *Pickering v. Busk*, 15 East, R. 38; *Fenn v. Harrison*, 3 T. R. 760; *Story on Agency*, § 73, and note (3); § 126, 127; note (1), § 452; *Morse v. Slue*, 1 Vent. R. 238; S. C. 1 Mod. R. 85.

⁵ *Case of Swans*, 7 Co. R. 17; 2 *Black. Comm.* 394; *Ross on Vendors*, 178.

⁶ Ibid.; *Inst. Lib.* 2, tit. 1, 15; *Bracton*, l. 2, c. 1; *Finch*, L. B. 2, c. 17; Ante, § 211.

as, in the fishes that swim into his brook, or river, or in the honey made in his woods ;¹ or *per privilegium*, — as, where he has a privilege of hunting and killing animals within certain limits.² In all other cases, the vendor is bound to make a good title, not only to a part, but to the whole ; and, if he do not, the vendee may, ordinarily, reject the contract, and reclaim the purchase-money, upon due notice.³ If, therefore, the goods sold be under mortgage or incumbrance of any sort, or, if the vendor have only a good title to a part, the sale will be voidable.⁴

§ 388. In the next place, a vendor is bound to do all that he expressly or impliedly agrees to do, in respect to *delivery* of the goods. Where the purchase and sale is completed, he is only bound to deliver the subject-matter, upon tender of the price ; unless credit be given,⁵ or unless the vendor admit that a tender would be fruitless and unnecessary.⁶ If, however, the vendor agree to deliver at a certain time and place, or on request, it is unnecessary, in the pleadings, to allege an actual tender and refusal, provided he aver, in the one case, a readiness and willingness, on his part, to receive the goods, and pay for them according to the terms of the sale, — or a request in

¹ 2 Black. Comm. 393 ; Brook, Abr. Tit. Propertio, 37 ; Ante, § 215.

² Case of Swans, 7 Co. R. 17 ; Ross on Vendors, 178.

³ See Ante, § 204, 205 ; Mandeville v. Welch, 5 Wheat. R. 277 ; Greenleaf v. Cook, 2 Wheat. R. 13.

⁴ Ante, § 204, 205 ; 2 Kent, Comm. Lect. 39, p. 469 ; 2 Story, Eq. Jurisp. § 779 ; Paton v. Rogers, 1 Ves. & Beam. 351 ; Graham v. Oliver, 3 Beav. R. 124, 128 ; Chambers v. Griffith, 1 Esp. R. 150 ; Roffey v. Shallcross, 4 Madd. Ch. R. 122 ; Casamajor v. Strode, 1 Coop. Sel. Cas. 510 ; Pothier de Vente, No. 42.

⁵ Miles v. Gorton, 2 Crompt. & Mees. 504 ; Bloxam v. Sanders, 4 Barn. & Cres. 941 ; Parker v. Rawlings, 4 Bing. R. 280 ; S. C. 12 Morse, R. 529 ; Cowper v. Andrews, 1 Hobart, R. 41 ; 2 Black. Comm. 448 ; Atkinson v. Barnes, Lofft, R. 325 ; Morton v. Lamb, 7 T. R. 125 ; New York Fireman's Co. v. DeWolf, 2 Cowen, R. 56.

⁶ Jackson v. Jacob, 3 Bing. N. C. 869.

the other case.¹ But if credit be not given, either expressly or by implication from the ordinary usage of trade, the vendor is bound to deliver the goods immediately, upon a requisition from the vendee; and, if he refuse so to do, the vendor may take the goods in trover, or may bring an action for damages, or may rescind the contract.² Yet, if the buyer be unable to pay for them, and be insolvent, the seller is not bound to deliver the goods to him, although they were sold on credit.³

§ 389. If there be any express agreement, the vendor is, of course, bound to comply with it in all particulars. Thus, if he agree to deliver flour of a particular brand or mark, the delivery of flour of a different brand or mark, although it be of equal or better quality, will not be sufficient.⁴ If, also, by the usage of trade, any special acts be required to be done by him, they impliedly form a part of the terms of his contract, and he is bound to perform them.⁵ So, also, if the subject-matter be sold by weight, or measure, or number, he is bound to weigh them, or measure them, or number them, at his own expense, and set them apart from the rest, and so long as any thing remains to be done by him, in order to distinguish, identify, or separate the goods, they are at his risk, whether they have been paid for or not.⁶ If, in such cases, the seller have done all that

¹ *Waterhouse v. Skinner*, 2 Bos. & Pull. 447; *Rawson v. Johnson*, 1 East. R. 203.

² 2 Kent, Comm. Lect. 39, p. 496; *Haswell v. Hunt*, cited in 5 T. R. 231; *Harris v. Smith*, 3 Serg. & Rawle, 20; *Chapman v. Lathrop*, 5 Cowen, R. 110.

³ *Reader v. Knatchbull*, 5 T. R. 218, n.

⁴ *Beals v. Terry*, 2 Sandf. Sup. Ct. R. 127.

⁵ *Zagury v. Furnell*, 2 Camp. R. 240; *Goodall v. Skelton*, 2 H. Black. 316.

⁶ *Whitehouse v. Frost*, 12 East, R. 614; *Hanson v. Meyer*, 6 East, R. 614; *Rugg v. Minett*, 11 East, R. 210; *Simmons v. Swift*, 5 Barn. & Cres. 857; S. C. 8 Dowl. & Ryl. 693; *Sandwick v. Sothorn*, 9 Adolph. & Ell. 895; *Wallace v. Breeds*, 13 East, R. 523; *White v. Wilks*, 5 Taunt. R.

is required of him as to a part, but something remains to be done to the rest, the risk of the goods, which are ready, is in the buyer, but the risk of those which are not ready, is in the seller.¹ If, however, although the seller have done all, so as to throw the risk of the goods on the vendee, the goods be lost or destroyed in consequence of his gross negligence or fault, the vendee may obtain damages therefor.² So, also, if the seller is required to do some act before he is legally or actually competent to make delivery, such act must be done by him, before he can set up any claim against the buyer, in respect of the goods, and before the goods are at the risk of the buyer. Thus, a seller of wine of his own growth is bound to produce a license from the office of excise, if it be necessary to enable him to make a legal delivery. So, also, if the goods he sells be pledged, he is bound to redeem them.³

§ 390. In cases where the vendor is bound to deliver the goods sold, he may either make an actual delivery of them, or he may make a constructive delivery of them. A delivery to a carrier, or agent, or servant, of the vendee, is considered as a delivery to the vendee himself, so as to throw upon him all risk of the goods; unless, indeed, there be a special agreement to the contrary;⁴ or, unless the goods be sent merely on trial to

176; *Macomber v. Parker*, 13 Pick. R. 182; *Rohde v. Thwaites*, 6 Barn. & Cres. 688; S. C. 9 Dowl. & Ryl. 293; *Shepley v. Davis*, 5 Taunt. R. 617; *Busk v. Davis*, 2 Maule & Selw. 397; *Howe v. Palmer*, 3 Barn. & Ald. 321; Ante, § 296 to 300; *Pothier de Vente*, § 44.

¹ *Hanson v. Meyer*, 6 East, R. 614; *Rugg v. Minett*, 11 East, R. 210; *Simmons v. Swift*, 5 Barn. & Cres. 857. Ante, § 299.

² *Pothier de Vente*, No. 57; *Traité des Obligations*, No. 456.

³ *Pothier de Vente*, § 42 to 48.

⁴ *Leeds v. Wright*, 1 Bos. & Pull. 320; *Dixon v. Baldwin*, 5 East, R. 175; *Dutton v. Solomonson*, 3 Bos. & Pull. 581; *Vale v. Bayle*, Cowp. R. 294; *Anderson v. Hodgson*, 5 Price, R. 630; *King v. Meredith*, 2 Camp. R. 639; *Swain v. Shepherd*, 1 Mood. & Rob. 223.

the consignee.¹ If goods be sent by water, the vendor must use proper diligence in giving notice of the consignment to the vendee; and, if it be the usage of trade, or if it have been the custom between the parties in previous dealings to insure, the vendor is bound to insure.²

§ 391. In respect to the *place* where goods are to be delivered, the rule is, in a contract of sale, that, if no place of delivery be agreed upon, the goods must be delivered at the place where they are at the time of the sale, unless some other place be designated by usage.³ And the buyer must come and take it. The seller cannot, without just cause after the sale, remove the things to another place, where the delivery is more expensive and incommodious to the buyer, without indemnifying him for the additional expense and trouble which he may thereby be obliged to incur. If, however, a place and time be appointed for delivery, the vendor is bound to have the goods ready at such time and place, and the vendee, in an action against him for breach of the contract, is not bound to aver that a tender of price was made, provided he aver that he was willing and ready to receive it, and to pay the price.⁴ If no time be appointed, the seller is bound, as we have seen,⁵ to deliver them whenever they are called for, upon tender of the price, or without tender of the price, if credit be given.⁶ If,

¹ *Swain v. Shepherd*, 1 Mood. & Rob. 223.

² 2 Kent, Comm. Lect. 39, p. 500; *Cothay v. Tute*, 3 Camp. R. 129; *London Law Mag.* Vol. 4, p. 359; *Story on Agency*, § 190; *Smith v. Lascelles*, 2 T. R. 189.

³ 2 Kent, Comm. Lect. 39, p. 505; *Adams v. Mirick*, Whart. Dig. of Penn. tit. Vendor; *Lobdell v. Hopkins*, 5 Cowen, R. 516; *Goodwin v. Holbrook*, 4 Wend. R. 380; *Pothier de Vente*, No. 51, 52.

⁴ *Rawson v. Johnson*, 1 East, R. 203; *Waterhouse v. Skinner*, 2 Bos. & Pull. 417.

⁵ Ante, § 310.

⁶ *Pothier de Vente*, No. 50.

however,¹ a time and place be appointed for delivery, and the vendee refuse to accept them, or be not present, (after notice,) the vendor may mark the goods and set them apart, and this will be a sufficient delivery.² But, if he retain possession of them, he will be considered as the bailee of the seller.³

§ 392. The vendor may also transfer the goods by a constructive delivery whenever they are ponderous and bulky, so as to render manual delivery difficult, or impracticable, or inconvenient, whenever it is waived by the vendee, or when they are not in his possession; and in such cases, any formal act is sufficient, which places the goods in the absolute power of the purchaser as owner, and which impliedly asserts that they are his property. Thus, the transference of the key of a warehouse, where goods are stored, or of a receipt, ticket, sale-note, dock-warrant, bill of lading, certificate, or other type of title, — or the marking and setting aside of a bale of goods, or the delivery of a sample, as a sign of transference, — or even the pointing out of the subject-matter, and surrendering all actual ownership, are *prima facie* evidence, sufficient to constitute a constructive delivery, if not controlled by proof, that they were not so intended, or understood by the parties.⁴

¹ Ibid., No. 51, 52.

² 2 Kent, Comm. Lect. 39, p. 508; Co. Litt. 207, a; Peytoe's case, 9 Co. R. 79, a; Lamb v. Lathrop, 13 Wend. R. 95; Savary v. Goe, 3 Wash. C. C. R. 130; Lamb v. Loomis, 7 Conn. R. 110; Garrard v. Zachariah, 1 Stew. Alab. R. 272; Thaxton v. Edwards, Ibid. 524; Johnston v. Baird, 3 Black Ind. R. 182.

³ Ibid.; Mason v. Briggs, 16 Mass. R. 453; Bailey v. Simonds, 6 N. Hamp. R. 159.

⁴ Chaplin v. Rogers, 1 East, R. 194; Atkinson v. Maling, 2 T. R. 465; Stoveld v. Hughes, 14 East, R. 312; Jewett v. Warren, 12 Mass. R. 300; Hinde v. Whitehouse, 7 East, R. 558; Manton v. Moore, 7 T. R. 67; Hurry v. Mangles, 1 Camp. R. 452; Wilks v. Ferris, 5 Johns. R. 335; Hollingsworth v. Napier, 3 Cow. R. 182; Ryall v. Rolle, 1 Atk. R. 171; Harman v. Anderson, 2 Camp. R. 243; Searle v. Keeves, 2 Esp. R.

§ 393. The *measure of diligence* required of the seller in keeping the articles sold, is that of a mere depository. He is bound to exercise only common and ordinary diligence, and not exact and scrupulous care.¹ And even this ordinary diligence is only required of him before default of the buyer to remove the goods according to his agreement; for after default it is only necessary for him to guard against such gross neglect or fault as indicates malice or want of good faith.² Yet if, after the seller has done all that is required of him to pass the title to the vendee, the goods be destroyed in consequence of his gross neglect or direct fault, he will be responsible therefor.³

§ 394. In the next place, if, between the time of the sale and delivery, the vendor be put to any charge in preserving and harboring the goods, the vendee is bound to reimburse him therefor; because, as the vendee is entitled to its fruits during that period, he ought to be liable for its charges.⁴ This rule would not, however, apply to cases where the storage by the vendor, for a certain duration of time, was contemplated in the contract, and formed a part of the consideration therefor. So, also, the vendee is not subject to charge for acts done previously to the delivery, which are incidental or necessary to the delivery, unless there be a special agreement to that effect. Thus, where the plaintiffs sold to the defendants a quantity of wool lying unsacked in three rooms, to be paid for upon delivery,

598; *Zwinger v. Samuda*, 7 Taunt. R. 261; *Rice v. Austin*, 17 Mass. R. 204; *Lucas v. Dorrien*, 7 Taunt. R. 288; *Spear v. Travers*, 4 Camp. R. 251.

¹ Pothier de Vente, No. 54; D. de Contrah. Empt. (18, l. 35, § 4). In contractibus in quibus utriusque contrahentis utilitas versatur, levis culpa, non etiam levissima, præstat. Story on Bailm. § 72, 73, 74, 190.

² Pothier de Vente, No. 55.

³ Pothier de Vente, No. 57; Traité des Obligations, No. 456.

⁴ Brown on Sales, § 488, p. 347; Domat, l. 67, § 10.

the quantity to be ascertained by weighing, but without any *express* contract as to who should be at the expense of sacking, and the plaintiffs sacked the wool in sacks furnished by the defendants, and then caused it to be weighed and shipped to the defendants; it was held, that, as the sacking preceded the delivery of the wool, the law would not *imply* a contract on the part of the defendants, to pay the plaintiffs for the sacking.¹

§ 395. In the next place, a vendor is bound to make good his *warranty*, according to its terms, and its evident import. If his warranty be expressed in technical phraseology, he is bound by its technical meaning, unless it be clearly shown that such a signification was not intended nor understood to be affixed thereto.² If it be limited to particular qualities, or to a certain duration of time, his liability does not extend beyond such qualities, or such time.³ In general, where no express warranty is given by the vendor, he is not liable for any defects in the subject-matter of sale, and the maxim *caveat emptor* applies. There are, however, several exceptions to this rule, extending the liability of the vendor, which obtain in the following cases, where the law creates an implied warranty. 1st. That the seller has a good title to the subject-matter.⁴ 2d. When an examination of goods by the buyer is impracticable, from their nature and situation at the time of the sale, — as, if they be in the hold of a ship, or in bales, or not present, in which case the vendor is understood to warrant that they are

¹ Cole, *et al.* v. Kerr, *et al.*, 20 Verm. (5 Wash.) 21. See Ante, § 297 a. 389.

² Jones v. Bowden, 4 Taunt. R. 847, 853; Button v. Corder, 7 Taunt. R. 405; Cook v. Moseley, 12 Wend. R. 277; Story on Contracts, § 243 to 249, 531.

³ Pasley v. Freeman, 3 T. R. 57; Wood v. Smith, 4 Car. & Payne, 46; Budd v. Fairmaner, 8 Bing. R. 48; S. C. 5 Car. & Payne, 78; Margetson v. Wright, 5 Moore & Payne, 606; S. C. 7 Bing. R. 603.

⁴ Ante, § 367.

merchantable.¹ 3d. Where goods are to be procured or manufactured by the vendor, to order, for a particular use and purpose, — in which case he is understood to warrant that they are reasonably fit for such purpose, as far as goods answering the description can be.² 4th. He is understood to warrant against the existence of any latent defect, in all cases where he knows of the existence of such defects, or where any special trust or confidence is reposed in him by the vendee, — or when he might from his situation have guarded against their existence, — as where he is a manufacturer or producer.³ 5th. Where he sells goods by sample, he impliedly warrants that the bulk corresponds to the sample in quality and in nature.⁴ The vendor is therefore bound to see that the goods sold correspond, in all these cases, to the implied warranty raised by the law.

§ 396. In the next place, as to *fraud*. If the vendor misrepresent any material fact which operates as inducement to the bargain, he will be guilty of fraud, and cannot enforce his contract against the buyer.⁵ But it is not only by wilful mis-

¹ Ante, § 368, 369; *Gardner v. Gray*, 4 Camp. R. 144; *Jones v. Bright*, 5 Bing. R. 535; *Brown v. Edgington*, 2 Mann. & Grang. 279; *Wright v. Hart*, 18 Wend. R. 456; *Hastings v. Lovering*, 2 Pick. R. 219, 220.

² Ante, § 371, 372; *Gray v. Cox*, 4 Barn. & Cres. 108; *Bluett v. Osborne*, 1 Stark. N. P. C. 381; *Chanter v. Hopkins*, 4 Mees. & Welsb. 399; *Ollivant v. Bayley*, 5 Adolph. & Ell. 289.

³ *Jones v. Bright*, 5 Bing. R. 535; S. C. 1 Dan. & Lloyd. 304; *Budd v. Fairmaner*, 8 Bing. R. 52; S. C. 1 Moore & Scott, 81; *Gallagher v. Waring*, 9 Wend. R. 20; *Martin v. Morgan*, 3 Moore, R. 635; Ante, § 374.

⁴ *Lorymer v. Smith*, 1 Barn. & Cres. 1; S. C. 2 Dowl. & Ryl. 23; *Hibbert v. Shee*, 1 Camp. R. 113; *Bradford v. Manley*, 13 Mass. R. 139; *Beebee v. Robert*, 12 Wend. R. 413; *Williams v. Spafford*, 8 Pick. R. 250; *Boorman v. Johnston*, 12 Wend. 566; *Parkinson v. Lee*, 2 East, R. 314; Ante, § 376.

⁵ Ante, § 165; Story on Contracts, § 171 to 175; 1 Story, Eq. Jurisp. § 192, 202; *Daniell v. Mitchell*, 1 Story, R. 172; 2 Kent, Comm. Lect. 39, p. 482; *Pothier de Vente*, n. 234, 237, 238; *Pidcock v. Bishop*, 3 Barn. &

representation that he may render himself liable, for if, knowing of the existence of an intrinsic defect, which is latent, or which, from the circumstances of the case, or the relation of trust between him and the vendee, it is his duty to disclose, he do conceal from the vendee the fact of its existence, he cannot enforce his contract on account of the fraud.¹ So, also, if he use any artifice, or trick, to impose upon the vendee, — or to disguise any defect, or to prevent him from observing it, — he will be guilty of fraud. But he is not bound to disclose extrinsic matters bearing upon the contract, of which he may have knowledge.²

§ 397. Having thus briefly considered the leading duties and obligations of vendors, we now come to their rights, which we shall very briefly recapitulate.

§ 398. And in the first place, as to their rights in respect to delivery. After the seller has done all that is required of him, in order to change the title to the subject-matter of sale, and to throw all risk therefor upon the vendee, he still has a right of *lien* thereupon, by which he is enabled to retain the possession thereof until payment is made, unless by the terms of the bargain credit be given to the vendee. If, however, although credit be given, the vendee suffer the goods to remain in the possession of the vendor until the term of credit has elapsed,

Cres. 605 ; Smith v. Bank of Scotland, 1 Dow, Parl. R. 272 ; Steward v. Coesvelt, 1 Car. & Payne, 23 ; Dobel v. Stevens, 3 Barn. & Cres. 623 ; S. C. 5 Dowl. & Ryl. 490 ; Vernon v. Keys, 12 East, R. 632 ; Fletcher v. Bowsher, 2 Stark. R. 561 ; Hill v. Gray, 1 Stark. R. 434.

¹ Mellish v. Motteaux, Peake's Cas. 115 ; Shepherd v. Kain, 5 Barn. & Ald. 240 ; Pothier de Vente, n. 240 ; Pilling v. Armitage, 12 Ves. R. 78 ; Baglehole v. Walters, 3 Camp. R. 154 ; 2 Kent, Comm. Lect. 39, p. 490 ; Ante, § 179, 181.

² Laidlaw v. Organ, 2 Wheat. R. 178, 179 ; Blydenburgh v. Welsh, Baldwin, C. C. R. 331 ; Calhoun v. Vechio, 3 Wash. C. C. R. 165.

or, until he has become insolvent, the right of lien revives.¹ So, also, if the vendee become insolvent before delivery, the terms, as to credit, are thereby annulled, and the seller may retain the goods until they are paid for, or until the bill or note given therefor is honored and completely paid. This right of lien, however, depends upon possession, and, as soon as he parts with possession he loses his lien. But, so long as he retains actual possession of any part of the subject-matter, he has a lien thereupon.² Again, a partial payment of the price by the vendee, only reduces his lien in amount, but does not diminish his right to retain every portion of the goods until the payment of the remainder.³ The species of possession which is required to keep alive the vendor's right of lien, is an actual possession; for a lien is not inconsistent with the buyer's having a complete title to the goods sold; and, in fact, can only arise when the title of the buyer becomes complete, — since a man can never properly be said to have a lien on his own property.⁴ The delivery, therefore, which will deprive the vendor of this right is not a delivery so as to pass the title, but an actual surrender of possession, — which, whether it be made to the vendee himself, or to the carrier, (who is considered as the agent of the vendee,) or to any other agent or servant of the vendee, is equally an abandonment by the vendor of his right of lien.⁵ While the vendee retains possession, and stores the goods in his warehouse for the benefit of the vendee, even

¹ *New v. Swain*, 1 Dan. & Lloyd, Merc. Cas. 193; *Dixon v. Yates* 2 Nev. & Man. 177; *Bloxam v. Sanders*, 4 Barn. & Cres. 948; *Tooke v. Hollingsworth*, 5 T. R. 215; *Hanson v. Meyer*, 6 East, R. 614.

² *Miles v. Gorton*, 2 Crompt. & Mees. 504; *Payne v. Shadbolt*, 1 Camp. R. 427; *Bloxam v. Sanders*, 4 Barn. & Cres. 941.

³ *Feise v. Wray*, 3 East, R. 102; *Hodgson v. Loy*, 7 T. R. 440.

⁴ *Cross on Lien*, 6; *Bloxam v. Sanders*, 4 Barn. & Cres. 498; *S. C.* 7 Dowl. & Ryl. 396; *Rohde v. Thwaites*, 6 Barn. & Cres. 338; *Townley v. Crump*, 5 Nev. & Man. 608; *Dixon v. Yates*, 5 Barn. & Adolph. 313.

⁵ *Ante*, § 286 to 293; *Leeds v. Wright*, 3 Bos. & Pul. 320; *Dixon v. Baldwin*, 5 East, R. 175; *Dutton v. Solomonson*, 3 Bos. and Pul. 584;

although he receive rent therefor, he will still be entitled to his lien so long as the interests of third persons do not intervene.¹ But he may, by a symbolical delivery, or by taking upon himself the character of bailee, entirely divest himself of possession, and thereby destroy all lien.²

§ 399. In the next place, after the vendor has, by abandoning possession, lost his right of lien, he still has a right of stoppage *in transitu*, — by which he is enabled at any time before the goods have arrived, and come into possession of the vendee, to retake them, if they be unpaid for, and if the vendee become insolvent during their transportation to him.³ This right can only be exercised in case of the insolvency of the vendee, when he has not already paid for the goods, — and when exercised, its effect is not to rescind the contract, but merely to reinvest the vendor with the rights which he had before surrendering possession. As it is founded in Equity, however, it cannot be so exercised as injuriously to interfere with the rights of third persons, acquired in good faith.⁴ If, therefore, a bill of lading,

Vale *v.* Bayle, Cowp. R. 294; Anderson *v.* Hodgson, 5 Price, R. 630; King *v.* Meredith, 2 Camp. R. 639; Whitaker on Lien, 70.

¹ Miles *v.* Gorton, 2 Crompt. & Mees. 513; Townley *v.* Crump, 4 Adolph. & Ell. 58; Greaves *v.* Hepke, 2 Barn. & Ald. 131; Elmore *v.* Stone, 1 Taunt. R. 458; Green *v.* Haythorne, 1 Stark. R. 447; Chapman *v.* Searle, 3 Pick. R. 44; Barrett *v.* Goddard, 3 Mason, R. 107.

² Chaplin *v.* Rogers, 1 East, R. 194; Cross on Lien, 327; Rice *v.* Austin, 17 Mass. R. 204; Jewett *v.* Warren, 12 Mass. R. 300; Atkinson *v.* Maling, 2 T. R. 465; Gordon *v.* Cameron, 7 T. R. 228; Chapman *v.* Searle, 3 Pick. R. 44.

³ Ellis *v.* Hunt, 3 T. R. 465; Newsome *v.* Thornton, 6 East, R. 17; Hodgson *v.* Loy, 7 T. R. 440; Eng. Law Mag. Vol. 5, p. 155; Assignees of Burghall *v.* Howard, 1 H. Black. R. 365, n.; Stokes *v.* La Riviere, 3 East, R. 397; Lickbarrow *v.* Mason, 2 H. Black. R. 362; Feise *v.* Wray, 3 East, R. 102; Newhall *v.* Vargas, 12 Maine, R. 93; 2 Kent, Comm. Lect. 39, p. 541. Ante, Ch. xi.

⁴ Wood *v.* Roach, 2 Dall. R. 180; The Constantia, 6 Rob. Adm. R. 321; Abbott on Shipping, 371.

or any negotiable instrument, which is the type of title, is indorsed, and sent by the consignor to the consignee, a *bonâ fide* assignment thereof, before the goods are stopped, will divest the vendor of this right of stoppage.¹ So, also, if credit be given, and, before the time for which it is allowed has elapsed, the vendee resell them to a third person, the original vendor cannot, upon the insolvency of the buyer, retake the goods.² A partial payment of price by the vendor has only the effect of reducing the vendor's lien *pro tanto*, but does not at all interfere with his right of stoppage.³

§ 400. In the next place, where the sale is conditional, and the seller retains some special claim on the goods, the allowing the vendor to take them, is not considered as an absolute surrender of possession by the vendee, so as to pass the title to him until the condition is performed, — except as to *bonâ fide* purchasers for a valuable consideration, without notice. As against all other persons, the vendee is considered as only holding the goods in trust for the vendor. In such cases, the question of intent determines the interpretation to be given to the surrender, and if it appear that the vendor meant to deliver the goods unconditionally, the seller has lost his right to retake, — but if it appear that he has only assented to a qualified delivery of the goods, with the understanding, that the property is not absolutely to pass until the terms of sale are complied with, he still retains his right to retake.⁴ Again,

¹ *Stanton v. Eager*, 16 Pick. R. 467; *Hawes v. Watson*, 2 Barn. & Cres. 543; *Dixon v. Yates*, 5 Barn. & Adolph. 336; *Miles v. Gorton*, 4 Tyrw. R. 299; Ante, § 343, 444.

² *Hollingsworth v. Napier*, 3 Caines' Cas. 182; *Hawes v. Watson*, 2 Barn. & Cres. 513; *Dixon v. Yates*, 5 Barn. & Adolph. 336; *Illsley v. Stubbs*, 9 Mass. R. 65; *Stubbs v. Lund*, 7 Mass. R. 453.

³ *Feise v. Wray*, 3 East, R. 102; *Newhall v. Vargas*, 13 Maine, R. 93; *Hodgson v. Loy*, 7 T. R. 440; 2 Kent, Comm. Lect. 39, p. 541.

⁴ *D'Wolf v. Babbett*, 4 Mason, R. 289; *Reed v. Upton*, 10 Pick. R. 22;

where the vendee, by a wrongful and fraudulent act, obtains possession of the goods, the vendor may recover them by an action of trover.¹

§ 401. The right of the vendor to stop the goods can be determined only by a delivery into the possession of the vendee. This delivery must either be a delivery into the hands of the vendee, at his warehouse, or at some warehouse used by him, or into the hands of his agent.² Whenever and wherever the vendee gets actual possession of the goods, the right of stoppage is gone.³ But whether the delivery to an agent be such as will prevent the vendor from retaking the goods, depends upon the question, whether the *transitus* is or is not thereby determined. If the delivery be to an agent for the purposes of transmission or carriage towards the vendee, and the place of ultimate destination, so far as that contract is concerned, is not reached, the right of stoppage remains. But if the delivery be to an agent who is to hold them subject to future orders, and for custody, or who is to transmit them to a foreign market away from the vendee, the right of stoppage is gone. The only question is, whether the agent holds them as an intermediate person between the vendor and vendee, or as a

Bloxam v. Sanders, 4 Barn. & Cres. 941; *Harris v. Smith*, 3 Serg. & Rawle, 20; *Hussey v. Thornton*, 4 Mass. R. 405; *Dodsley v. Varley*, 12 Adolph. & Ell. 632; *Reeves v. Capper*, 5 Bing. N. C. 136.

¹ *Hawse v. Crowse*, Ryan & Mood. 414; *Abbotts v. Barry*, 1 Ball. & Beat. 369; *Noble v. Adams*, 7 Taunt. R. 59; *Stephenson v. Hart*, 4 Bing. R. 476; *Earl of Bristol v. Wilmore*, 1 Barn. & Cres. 514; *S. C.* 2 Dowl. & Ryl. 755.

² *Oppenheim v. Russell*, 3 Bos. & Pul. 44; *Miles v. Ball*, 2 Bos. & Pul. 461; *Foster v. Frampton*, 6 Barn. & Cres. 109; *Hunter v. Beal*, cited 3 T. R. 466; *James v. Griffin*, 2 Mees. & Welsb. 632; *Dixon v. Baldwin*, 5 East, R. 175; *Scott v. Pettit*, 3 Bos. & Pul. 469; *Barrett v. Goddard*, 3 Mason, R. 107; *Rowe v. Pickford*, 8 Taunt. R. 83.

³ *Allen v. Gripper*, 2 Crompt. & Jerv. 218; *Conard v. Atlantic Ins. Co.*, 1 Peters, R. 386; *Foster v. Frampton*, 6 Barn. & Cres. 107.

special bailee or agent; for, in the former case, the right of stoppage remains; while, in the latter case, it is gone.¹ The vendor may, also, divest himself of his right to retake the goods, by a constructive or symbolic delivery of them wherever a manifest intention appears on his part to surrender absolutely the possession.² Indeed, a part delivery of goods, bought under an entire contract, is ordinarily considered as an absolute delivery of the whole, so as to destroy the right of stoppage, although, if the circumstances indicate an intention on the part of the seller to distinguish between the part delivered and the remainder, and to retain the latter as security, his right will still be good.³

§ 402. In the next place, if the buyer unreasonably refuse to accept goods, the title of which has been properly passed to him, the vendor is not obliged to allow them to perish on his hands, but he may, after giving notice to the vendee of his readiness to deliver them, and after allowing a reasonable time to elapse, proceed to sell them at auction, and may hold the buyer responsible for the difference between the original price and the *net* sum they bring.⁴ If no price have been agreed

¹ *Stokes v. La Riviere*, 3 East, R. 397; *Coates v. Railton*, 6 Barn. & Cres. 422; *Rowe v. Pickford*, 8 Taunt. R. 83; *Scott v. Pettit*, 3 Bos. & Pul. 469; *Leeds v. Wright*, 3 Bos. & Pul. 320; *Stubbs v. Lund*, 7 Mass. R. 457.

² *Ellis v. Hunt*, 3 T. R. 464; *Wright v. Lawes*, 4 Esp. N. P. C. 82; *Foster v. Frampton*, 6 Barn. & Cres. 107; *Harman v. Anderson*, 2 Camp. R. 243.

³ *Slubey v. Hayward*, 2 H. Black. 504; *Hammond v. Anderson*, 1 Bos. & Pull. 69; *Crawshay v. Eades*, 1 Barn. & Cres. 180. These cases are, however, modified so as to agree with the doctrine in the text in *Bunney v. Poyntz*, 4 Barn. & Adolph. 568; *Dixon v. Yates*, 5 Barn. & Adolph. 339.

⁴ 2 Kent, Comm. Lect. 39, p. 505; *Sands v. Taylor*, 5 Johns. R. 395; *Adams v. Mirick*, cited 5 Serg. & Rawle, 32; *Girard v. Taggart*, 5 Serg. & Rawle, 19; *McLean v. Dunn*, 1 Moore & Payne, 761; 4 Bing. R. 722;

upon, the market value at the time of the bargain will be taken to be the price.

§ 403. We now come to the *duties and obligations of the vendee*. And, in the first place, it is the duty of the vendee to pay the price of the goods,—and if no price be expressly agreed upon, to pay their market value, at the time of the sale.¹ So, also, if credit be given for a certain time, or if a bill of exchange or promissory note be taken by the vendor, the vendee is bound to pay for the goods at the end of the time, for which credit was given, or to honor the bill or note at its maturity. If the payment of the price be a condition precedent to taking the goods, as it is in all cases where credit is not expressly or impliedly given; he cannot take them until tender or payment thereof.² So, also, the vendee is bound to offer the whole price, and he cannot, by offering part of it, claim to receive an equivalent portion of the goods, although they happen to be divisible.³

§ 404. In the next place, if the goods be such as were contracted for, the vendee is bound to take them away, unless, by the terms of the contract, the seller is to retain possession, or is to send them to him. In the absence of an express agreement to such effect, a contract will be implied in relation thereto

Langfort v. Tiler, 1 Salk. R. 113. But, see Greaves v. Ashlin, 3 Camp. R. 426.

¹ Hoadley v. McLaine, 10 Bing. R. 512; S. C. 4 Moore & Scott, 340; Bluett v. Osborne, 1 Stark. R. 384; Clunnez v. Pezzey, 1 Camp. R. 8; Basten v. Butter, 7 East. R. 483; Street v. Blay, 2 Barn. & Adolph. 456.

² Barrett v. Pritchard, 2 Pick. R. 512; Bishop v. Shillito, 2 Barn. & Ald. 329, n.; New York Fireman's Ins. Co. v. D'Wolf, 2 Cow. R. 56; Brown on Sales, § 307, p. 210; 2 Black. Comm. 448; Ante, § 225; Conway v. Bush, 4 Barb. Sup. Ct. R. 565.

³ Ibid.; Brown on Sales, § 307, p. 211; Pothier de Vente, No. 63, 64, 65, 66, 67.

from the usage of trade, or the previous habits of dealing between the parties. But, in default thereof, it is the duty of the vendee to take the goods within a reasonable time, or he will be liable to the vendor for warehouse rent, and other expenses, growing out of the custody of them, — or even to an action for not removing them, in case the seller is prejudiced by his delay.¹ But the neglect of the vendee, although it may subject him to damages, will not entitle the vendor, of his own authority, to rescind the contract, and sell the goods to another, on his own account,² — although it would entitle him to sell them on account of the vendee.³

§ 405. But, in the next place, if the goods have not been paid for, and are not such as were contracted for, nor such as the buyer is obliged to take, his duty is to return them immediately upon discovery of their insufficiency, — or to give notice thereof to the vendor.⁴ He is, however, allowed a reasonable time after receiving them, in which to decide whether he will keep them or not.⁵ If he offer to return them and the vendor refuse to receive them, his offer will be considered as equivalent to an actual return, and will invest him with all rights of action, which he would have had without such refusal. But, if he keep the goods for an unreasonable time, or treat them as his own, he will, ordinarily, be considered as ratifying the contract

¹ Pothier, *Contrat de Vente*, No. 290; Brown on Sales, § 497, 498, p. 353, 354; *Greaves v. Ashlin*, 3 Camp. R. 426.

² *Greaves v. Ashlin*, 3 Camp. R. 426.

³ See Ante, § 314; *Sands v. Taylor*, 5 Johns. R. 395; *Maclean v. Dunn*, 4 Bing. R. 722; 1 Moore & Payne, 761.

⁴ See Post, § 418, 420.

⁵ *Fisher v. Samuda*, 1 Camp. R. 190; *Groning v. Mendham*, 1 Stark. R. 257; *Poulton v. Lattimore*, 9 Barn. & Cres. 259; S. C. 4 Man. & Ryl. 208; *Adam v. Richards*, 2 H. Black. R. 573; *Street v. Blay*, 2 Barn. & Adolph. 456; *Prosser v. Hooper*, 1 Moore, R. 106; *Rowe v. Osborne*, 1 Stark. R. 140.

of sale.¹ It is, however, for a jury to determine whether the time during which he has kept them, is or is not unreasonable under the circumstances, — and whether his conduct is to be interpreted as ratifying the bargain.² So, also, if he keep the goods despite their inferiority, his duty is to give notice to the vendor that they do not conform to the contract, or his silence may be interpreted as a waiver of all right to complain of the goods, and will afford a presumption that they did correspond to the agreement. It does not, however, seem that the want of such notice will, of itself, render the vendee liable for the full price, provided that he prove the goods to have been inferior and defective, — but will only afford *primâ facie* evidence that they were in conformity with the terms of the contract.³

§ 406. If the contract be executed, and the goods have been paid for, the vendee cannot rescind the contract and return the goods, unless for fraud, or by reason of a special agreement to that effect, — but must sue the vendor for a breach of the warranty; and, in such case, he can recover the difference between the price paid and the actual worth of the goods.⁴

§ 407. We now come to the consideration of the *rights of the vendee*, which, although they have been incidentally anticipated in the present treatise, will, nevertheless, require consideration. And, in the first place, if the vendor wholly fail to make a good title to the subject-matter of sale, the vendee may rescind the contract of sale, and return it to the vendor.

¹ Towers v. Barrett, 1 T. R. 136; Thornton v. Wynn, 12 Wheat. R. 192; Coolidge v. Brigham, 1 Metcalf, R. 550; Fielder v. Starkin, 1 H. Black. R. 17; Poulton v. Lattimore, 9 Barn. & Cres. 259; S. C. 4 Man. & Ryl. 208.

² Ibid.; Prosser v. Hooper, 1 Moore, R. 106; Patteshall v. Tranter, 3 Adolph. & Ell. 103; S. C. 4 Nev. & Man. 649.

³ Fielder v. Starkin, 1 H. Black. R. 17; Poulton v. Lattimore, 9 Barn. & Cres. 259; S. C. 4 Man. & Ry. 208; Clark v. Baker, 5 Metcalf, 452.

⁴ Street v. Blay, 2 Barn. & Adolph. 462.

There is, however, much diversity of doctrine in the different cases, as to whether a partial defect of title in respect to a trifling or non-essential portion, will entitle the vendee to rescind the contract, — or whether he will, nevertheless, be bound to accept the goods upon a *pro tanto* deduction of the price. If the defect of title be in respect to a part essential to the enjoyment of the rest, or which would very materially diminish the value of the remainder, — especially if it formed the principal, or even material inducement to the sale, so that the knowledge of such defect would have prevented the bargain, the buyer would, of course, be entitled to rescind.¹ But if the failure be in respect to a wholly insignificant and trifling part, or if it would not have influenced the bargain, had it been previously known, as if a man contract to buy 500 bales of cotton, and the title of the vendor fail as to two, the better doctrine seems to be that such a failure of title will only afford ground for a *pro tanto* reduction of the price.² Yet, if the contract be entire, a failure of title as to the smallest portion would seem to entitle the vendee to refuse to receive the remainder.³ The same rule would apply to cases where the title, though good in law, is bad in Equity; or where the title is doubtful.⁴

¹ *Mowrey v. Walsh*, 8 Cowen, R. 238; *Halsley v. Grant*, 13 Ves. R. 78; *Paton v. Rogers*, 1 Ves. & Beam. 351; *Graham v. Oliver*, 3 Beav. R. 124, 128; *Smith v. Tolcher*, 4 Russ. R. 305; *Stapylton v. Scott*, 13 Ves. R. 426; *Farrer v. Nightingal*, 2 Esp. R. 639; 2 Story, Eq. Jurisp. § 779. See Ante, § 203; Post, ch. xiv.

² *Ibid*; *Chambers v. Griffith*, 1 Esp. R. 150; *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Miner v. Bradley*, 22 Pick. R. 459; *James v. Shore*, 1 Stark. R. 426; 2 Kent, Comm. Lect. 39, p. 475, 476.

³ *Chambers v. Griffith*, 1 Esp. R. 150; *Roffey v. Shallcross*, 4 Madd. Ch. R. 122; 2 Kent, Comm. Lect. 39, p. 470, note (b); *Casamajor v. Strobe*, 1 Coop. Sel. Cas. 510; S. C. 8 Condén. Ch. R. 516; *Johnson v. Johnson*, 3 Bos. & Pull. 162; *Miner v. Bradley*, 22 Pick. R. 459; Story on Contracts, § 16, 17, 553.

⁴ *Maberly v. Robins*, 5 Taunt. R. 625; S. C. 1 Marsh. 258; *Hartley v. Pehall*, Peake, 131; *Bank of Columbia v. Hagner*, 1 Peters, R. 455.

§ 408. In the next place, if the goods sold do not correspond to the express or implied warranty, and the price has not been paid, the purchaser may return them to the vendor and avoid his contract. If, therefore, they be bought under circumstances where an examination was impracticable, and they prove not to be merchantable; or if they do not correspond to a sample; or be bought for a particular use and prove not to be fit therefor; or contain latent defects of which the vendor was aware, or the existence of which he fraudulently concealed; he may, if the price have not been paid, either return the goods and rescind the bargain, — or he may keep them, after giving notice to the seller of their inferiority; and if he choose the latter course, he will only be liable to the vendor for the actual worth of the goods, and not for the agreed price.¹ The vendee is, however, bound to give notice to the vendor of the insufficiency of the goods to satisfy the terms of the bargain, or his silence will afford a presumption that they were sufficient. But even when no notice is given, yet if he prove satisfactorily that the goods were inferior, he will only be bound to pay their actual worth, — and if he prove that they were utterly worthless, he will be bound to pay nothing.² If, however, he give notice of the inferiority of the goods, and offer to return them, he may, upon the refusal or neglect of the vendor to take them, charge warehouse rent for their storage, and the expenses of keeping, during such period of time as would reasonably be required to sell to advantage.³

§ 409. But, where the vendor is a great distance from the

¹ *Poulton v. Lattimore*, 9 Barn. & Cres. 259; *Adam v. Richards*, 2 H. Black. R. 573; *Street v. Blay*, 2 Barn. & Adolph. 456.

² *Poulton v. Lattimore*, 9 Barn. & Cres. 259; *Fielder v. Starkin*, 1 H. Black. R. 17.

³ *Caswell v. Coare*, 1 Taunt. R. 566; S. C. 2 Camp. R. 82; *Germaine v. Burton*, 3 Stark. R. 32; *Chesterman v. Lamb*, 4 Nev. & Man. 195; S. C. 2 Adolph. & Ell. 129; *Ellis v. Chinnock*, 7 Car. & Payne, 169; *McKenzie v. Hancock*, Ry. & Mood. 436; *King v. Price*, 2 Chitty, R. 410.

vendee, and the goods cannot be returned without great expense, the vendee may, if they do not correspond to the contract, after giving notice to the vendor, and awaiting a reasonable time for his orders, proceed to sell the goods on account of the vendor, and, if they have been paid for, he can recover the difference between the net proceeds of such sale and the original contract price, — or, if they have not been paid for, he will be liable only for such proceeds.¹

§ 410. But in an executed contract where the goods have been paid for, the vendee has no right to return them upon their failure to correspond to the warranty, but he must sue upon the warranty, and he can then recover, as damages, the difference between the contract price and the actual worth of the goods.²

§ 411. In the next place, in cases where the vendor has been guilty of fraudulent misrepresentation and concealment, the vendee may return the goods and rescind the contract.³ We have already had occasion to consider the cases in which fraud is to be implied, and it is unnecessary, therefore, here to repeat the doctrines applicable thereto.⁴

§ 412. In the next place, if the vendor refuse to deliver the subject-matter of sale, or be disabled from so doing, the vendee may reclaim the whole price, if it have been paid, and also any

¹ *McLean v. Dunn*, 4 Bing. R. 726; *Greaves v. Ashlin*, 3 Camp. R. 425; *Poulton v. Lattimore*, 9 Barn. & Cres. 259; *Fielder v. Starkin*, 1 H. Black. R. 17.

² *Street v. Blay*, 2 Barn. & Adolph. 462; *Weston v. Downes*, 1 Doug. R. 23; *Towers v. Barrett*, 1 T. R. 133; *Payne v. Whale*, 7 East, R. 274; *Power v. Wells*, Doug. R. 24, n.; *Emanuel v. Dane*, 3 Camp. R. 299.

³ *Ibid.*

⁴ See Ante, § 158 to 163.

damages which he may actually have suffered from the breach of contract. If the price be not paid, the same rule applies in respect to damages. Damages are, however, in such cases, ordinarily restricted to the loss or injury resulting directly from a non-compliance with the terms of the contract by the vendor, and do not embrace any remote and indirect injury. The measure of damages is usually the value of the goods at the time when they should have been delivered, or, if they have not been paid for, the difference between their value at the time when they should have been delivered, and the actual price paid.¹ If, by the agreement, they be to be delivered at a particular place, their value at such place at the time of delivery is to be taken.² Yet, if the price be paid, and the value of the goods be less at the time and place of delivery, the vendee can recover the full price.³ So, also, the same rule

¹ *Mercer v. Jones*, 3 Camp. R. 477; *Cooper v. Chitty*, 1 Burr. R. 31; *Kennedy v. Whitwell*, 4 Pick. R. 467; *Gainsford v. Carroll*, 4 Dowl. & Ryl. 161; S. C. 2 Barn. & Cres. 624; *Leigh v. Paterson*, 2 Moore, R. 588. The same rule also obtains in the Scottish Law, Brown on Sales, p. 217, § 313; and in the Civil Law of France, Pothier, *Contrat de Vente*, No. 72; *Traité des Oblig.* No. 161, and in the Roman Law. “Quum per venditorem steterit, quominus rem tradât, omnis utilitas emptoris in æstimationem venit, quæ modo circa ipsam rem constitit.” Dig. l. 21, § 3. See Post, § 441; *Swift v. Barnes*, 16 Pick. R. 194; *Quarles v. George*, 23 Pick. R. 400; *Shepherd v. Hampton*, 3 Wheat. R. 200. In *Dunlop v. Higgins*, 1 Clark. & Finnelly (N. S.) 381, it is held, that in an action of damages for breach of contract in the sale of goods, the measure of damages is not merely the amount of the difference between the contract price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed. But see Post, § 454 a, and cases cited.

² *Ibid.*; Brown on Sales, p. 220, § 315; *Shaw v. Nudd*, 8 Pick. R. 9.

³ Pothier de Vente, No. 69. This is the doctrine which is stated by Pothier in his *Treatise on Sales*, and is in coincidence with the doctrine of Dumoulin, (*Tractat. de eo quod interest*, No. 68, 69,) and in opposition to the doctrine of Caillet, (*Code d'Eviction*, in Meerman's *Thesaurus*, 2, 324,) and Domat, (*De Vente*, Lib. 1, tit. 2, § 10, n. 215). The reasoning of

applies to a delay in delivery.¹ Again, in addition to the value at the time of delivery, the vendee may also recover any

Pothier is as follows: " Les interprètes du droit Romain, qui ont écrit avant Dumoulin, ne reconnaissent dans les conclusions secondaires de l'action *ex empto*, en cas de défaut de tradition et en cas d'éviction, qu'un seul objet ; savoir, la condamnation de la somme à laquelle devait être estimé l'intérêt présent qu'a l'acheteur d'avoir la chose qui ne lui a pas été livrée, ou dont il a souffert éviction. De ce principe ils tiraient cette conséquence, que si, eu égard à l'état présent de la chose vendue, qui, depuis le contrat, serait considérablement diminuée de prix, l'estimation de l'intérêt qu'a l'acheteur d'avoir cette chose était portée à une somme au-dessous du prix pour lequel elle avait été vendue, le vendeur ne devait rendre que cette somme, et pouvait retenir le surplus du prix. *Donat, liv. 1, t. 2, du Contrat de Vente, § 10, n. 15*, quoiqu'il ait écrit long-temps depuis Dumoulin, a aussi suivi l'ancienne opinion ; elle est aussi suivie par Caillet, professeur de Poitiers, dans l'élégant commentaire qu'il a fait sur le titre du *Code de evict.* Dumoulin, qui a mieux approfondi cette matière qu'aucun interprète, dans son traité de *eo quod interest*, n. 68, 69, etc. réfute cette opinion, et enseigne que l'action *ex empto in id quod interest*, en cas de défaut de tradition, de même qu'en cas d'éviction, a deux objets ; le principal est la restitution du prix qui a été payé, ou la décharge de celui qui serait encore dû ; le second est le paiement de tout ce que l'acheteur souffre de plus par le défaut de tradition ou par l'éviction. Ces deux objets se trouvent clairement distingués en la loi 43, *in fin. ff. de act. empt. Non pretium continet tantum, sed omne quod interest emptoris*. C'est pourquoi, lorsque la chose que j'ai achetée, a été, depuis le contrat, considérablement détériorée et dépréciée, soit par ma négligence, soit par cas fortuit ; *putà*, si j'ai acheté une maison pour le prix de 20,000 livres, et que, depuis le contrat, une partie des bâtimens ait été consumée par le feu du ciel, de manière que cette maison ne vaille que 10,000 liv., et qu'en conséquence l'intérêt que j'ai aujourd'hui d'avoir ou de retenir cette maison soit d'une valeur beaucoup moindre que n'est le prix de 20,000 liv. pour lequel je l'ai achetée ; néanmoins j'ai droit, en cas de défaut de tradition ou en cas d'éviction, de demander à mon vendeur la restitution de ce prix entier de 20,000 liv. La raison est qu'il est de la nature de tous les contrats commutatifs et synallagmatiques, tel qu'est le contrat de vente, que l'une des parties ne contracte son engagement envers l'autre, qu'à la charge que l'autre partie ne manquera pas au sien. C'est pourquoi, n'ayant contracté envers mon vendeur l'engagement de lui payer le prix,

¹ Pothier de Vente, § 75.

incidental expenses occasioned by the refusal or neglect on the part of the vendor to deliver them, such as the expense of

qu'autant qu'il ne manquerait pas au sien, et mon vendeur y ayant manqué par défaut de tradition, ou faute de me défendre de l'éviction que j'ai soufferte, l'obligation, que j'avais contractée envers lui payer le prix, de même que le droit qui résultait à son profit de son obligation, se résolvent. Mon vendeur cesse dès lors d'avoir aucun droit au profit que je me suis obligé de lui payer ; d'où il suit qu'il ne peut en rien exiger, et que s'il a été payé, il n'en peut rien retenir, et que je le puis répéter en entier, *condictione sine causâ*. D'ailleurs, il est manifestement contre l'équité que mon vendeur, qui est en faute en me vendant une chose qui ne lui appartient pas, et qui me trompe, profite de cela pour gagner sur moi une partie du prix. On oppose en vain contre ce sentiment la loi 23, *Cod. de evict.*, où il est dit qu'il est dû à l'acheteur, en cas d'éviction, *quantum tuâ interest, non quantum pretii nomine dedisti* ; car cela doit s'entendre en ce sens, non (solum) *quantum pretii nomine dedisti*. On oppose aussi la loi 8, *ff. de hæc. vend.*, où il est dit que, dans le cas de l'action qu'a l'acheteur contre celui qui lui a vende des droits successifs comme lui appartenans, qui ne lui appartenaient pas, on doit estimer ce que valent ces droits. Dumoulin répond fort bien à cette objection, que cette estimation ne se fait qu'en faveur de l'acheteur contre le vendeur, qui doit être condamné à payer toute la valeur de ces droits successifs, au cas qu'ils valussent plus que le prix pour lequel ils ont été vendus ; mais il doit toujours rendre tout le prix quand même ils vaudraient moins. A l'égard de la loi 70, *ff. de evict.*, sur laquelle Domat se fonde, et où Paul dit ; *Evictû re, ex empto actio non ad pretium duntaxat recipiendum, sed ad id, quod interest, competit : ergo et si minor esse caput, damnum emptoris est* ; Dumoulin répond que ces termes, *damnum emptoris est*, ne se réfèrent pas *ad pretium recipiendum*, le prix devant être toujours restitué en entier à l'acheteur en cas d'éviction ; mais ils se réfèrent seulement *ad id quod interest emptoris* ; car, de même que ce *id quod interest emptoris non habere licere*, augmente à mesure que la chose augmente en valeur, de même il diminue et se réduit à rien lorsque la chose diminue de valeur ; et en ce sens, *si res minor esse caput, damnum emptoris est*. On doit faire la même réponse à la loi 45, *ff. de act. empt.* qui est aussi citée par Domat pour son opinion. Ce qui est dit en cette loi, que *Minuitur præstatio, si servus deterior apud emptorem effectus sit, quum evincitur*, ne doit pas s'entendre en ce sens, *ut minuatur præstatio quantum ad restitutionem pretii*, mais seulement *ut minuatur præstatio ejus quod ultra pretium interesse posset emptoris* ; parce que ce *hoc quantum interest* se règle eu égard à l'état auquel se trouve la chose au temps de l'éviction, et non à l'état

sending a ship or carriage, or the procuring of a warehouse, in which to store them.¹

auquel elle était au temps du contrat. La loi ex mille, l. 64, ff. de evict. qui est aussi citée par Domat, n'a aucune application à cette question. Elle n'est pas dans l'espèce d'une chose qui aurait été simplement détériorée ou dépréciée; mais elle est dans l'espèce d'une chose dont une partie a été entièrement détruite, et dont par conséquent l'acheteur ne peut plus être évincé, puisqu'elle ne subsiste plus; d'où il suit que, lorsque par la suite l'acheteur souffre éviction d'une partie de ce qui reste de cette chose, le vendeur ne peut être tenu de la restitution du prix, que pour la partie dont l'acheteur est évincé, et non pour la partie qui ne subsiste plus, et dont il ne peut par conséquent être évincé. Voyez l'explication de cette loi que donne Dumoulin, et que nous rapportons *infra*, n. 154. Enfin on ne peut tirer contre la doctrine de Dumoulin aucun argument de la loi 66, § fin. ff. de evict.; car la garantie des partages, dont il est parlé dans cette loi, se régit par d'autres principes que la garantie dont est tenu un vendeur, comme nous le verrons *infra*, part 7, art. 6. Outre les argumens tirés de ces lois, Caillet oppose encore que le sentiment du Dumoulin est contraire au principe de droit, suivant lequel la diminution, qui survient depuis le contrat de vente, doit tomber sur l'acheteur. Or, dit-il, elle n'y tomberait pas, si, nonobstant cette diminution, il avait droit de répéter, en cas d'éviction, le prix entier qu'il a payé. La réponse est que, suivant les principes de droit, la diminution, qui arrive sur la chose vendue, doit tomber sur l'acheteur, tant qu'elle lui reste, et que le vendeur ne contrevient pas à son obligation; mais lorsqu'il y contrevient, les principes de droit n'empêchent pas qu'il ne doive rendre le prix entier. Au contraire, les principes de droit, et le seul bon sens, enseignent que, le vendeur ne remplissant pas son engagement, l'acheteur est dégagé, de celui qu'il avait contracté de lui payer le prix. Caillet insiste, et dit que les raisons de Dumoulin ne portent que contre le vendeur de mauvaise foi; que le vendeur de bonne foi remplit son engagement en entier, en offrant les dommages et intérêts. La réponse est que l'obligation des dommages et intérêts n'est qu'une obligation secondaire, qui suppose l'inexécution de l'obligation principale; or il suffit qu'il y ait eu une inexécution de l'obligation principale de vendeur, pour que l'acheteur ait été libéré de la sienne. C'est aussi mal-à-propos que Caillet avance que Dumoulin a changé-d'avis au n. 124 du même traité. La question qu'il y traite ne se décide pas par ces principes généraux, comme nous le verrons *infra*, n. 164, où nous rapporterons cette question.

¹ Pothier de Vente, § 74 to 78; *Dunlop v. Higgins*, 1 Clark & Finnelly, (N. S.) 381.

§ 413. There was, also, a question relating to this subject, which was much discussed by the civilians, as to whether a vendor could be compelled to deliver the thing sold, or whether his obligation was satisfied by his paying the damages. Pothier maintains the former doctrine, Schulting and Noodt maintain the latter doctrine.¹ In the Common Law, the vendee may

¹ Pothier de Vente, No. 68. "On a agité la question, si le vendeur, qui a été condamné à livrer la chose, et qui l'a en sa possession, peut être contraint précisément à la livrer, ou si, sur son refus de la livrer, son obligation et la condamnation doivent seulement se convertir en une obligation et en une condamnation de dommages et intérêts. Plusieurs interprètes du droit romain, et entre autres Sculting et Noodt, ont été de ce dernier sentiment. Ils se fondent, 1, sur la loi 4, Cod. de act. empt., qui dit formellement que le vendeur qui, par malice et obstination, ne livre pas la chose, doit être condamné aux dommages et intérêts de l'acheteur: *Si traditio rei venditæ procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratus præses, tantum in condemnationis taxationem deducere curabit*. Ils disent, 2, que le vendeur demeurant propriétaire de la chose vendue jusqu'à la tradition, il serait incivil de le dépouiller par force de sa propre chose. Enfin, 3, ils allèguent que c'est une maxime de droit que *Nemo potest cogi præcisè ad factum*; d'où ils concluent que *Nemo potest cogi ad traditionem*. L'opinion contraire a aussi d'illustres défenseurs. Je la crois plus véritable, et je pense, qu'en cas de refus par le vendeur de livrer la chose vendue qu'il a en sa possession, le juge peut permettre à l'acheteur de la saisir et le l'enlever, si c'est un meuble; ou de s'en mettre en possession, si c'est un fonds de terre ou une maison, et d'en expulser le vendeur par le ministère d'un sergent, s'il refusait d'en sortir. Il est facile de répondre aux raisons alléguées cidessus pour la première opinion. La réponse à la loi 4, Cod. de act. empt., est que cette loi accorde bien à l'acheteur l'action *in id quod interest*, contre le vendeur qui refuse injustement de lui livrer la chose vendue; mais elle ne dit pas que cette action soit le seul moyen qu'il ait pour se faire rendre justice. Paul, Sent. 1, 13, 4, dit formellement que le vendeur peut être contraint précisément à livrer la chose, *potest cogi ut tradat*: mais comme il n'est pas toujours facile à l'acheteur de se faire mettre manu militari en possession de la chose vendue, le vendeur pouvant la soustraire et la cacher, il est permis à l'acheteur, par cette loi, d'avoir recours à l'action *in id quod interest*; il a le choix des deux moyens. A l'égard de ce qu'on dit en second lieu, que le vendeur demeurant propriétaire de la chose vendue, il

maintain trover against the vendor, if, after the sale is completed and the title is passed, the latter refuse to surrender the goods sold.¹

serait incivil de lui ôter de violence ce qui lui appartient, je réponds qu'il n'y a pas plus d'incivilité à cela, qu'à saisir les biens d'un débiteur qui refuse de payer ce qu'il doit. Enfin, quant à ce qu'on dit que *Nemo potest cogi ad factum*, et que les obligations qui consistent à faire quelque chose se résolvent *in id quod interest actoris*, je réponds que cette maxime n'a d'application, que lorsque le fait renfermé dans l'obligation est un pur fait de la personne de débiteur, *merum factum*; comme lorsque quelqu'un s'est obligé envers moi de me copier mes cahiers ou de me faire un fossé, il est évident que je ne puis le faire écrire ou travailler au fossé malgré lui, et que son obligation, en cas de refus par lui de l'exécuter, doit nécessairement se résoudre en dommages et intérêts. Il n'en est pas de même du fait de la tradition : ce fait non est *merum factum*, *sed magis ad dationem accedit*; et le débiteur peut y être contraint par la saisie et l'enlèvement de la chose qu'il s'était obligé de livrer. Notre sentiment est celui de Cujas, ad l. 1, ff. de act. empt.; de Zoes, parat. ad dict. tit.; de Perez, Cod. ad dict. tit.; de Davesan, Tr. de empt. vend. Parmi ceux mêmes qui croient la première opinion plus conforme au droit romain, il y en a qui conviennent que les Romains s'étaient écartés en cela du droit naturel. C'est le sentiment de Barbeyrac. Enfin il paraît que l'opinion que nous embrassons est suivie dans la pratique, comme en convient Wissenback, quoiqu'il soit de l'opinion contraire. Il y a néanmoins certains cas dans lesquels, pour des considérations particulières, notre décision doit souffrir exception. Par exemple, si une personne, qui était dans l'intention de démolir sa maison, m'a vendu une certaine poutre, ou quelque autre chose faisant partie de cette maison; quoique les lois romaines, qui ne permettaient pas la vente des choses unies à des édifices, n'aient pas lieu parmi nous, et que cette vente soit valable, néanmoins, si le vendeur, ayant changé d'avis, et ne voulant plus démolir sa maison, refuse de me livrer ces choses, on ne me permettra pas de démolir sa maison pour enlever les choses qu'il m'a vendues qui y sont unies, et son obligation doit, en ce cas, se résoudre en dommages et intérêts. Il y a un intérêt public qui s'oppose à la démolition d'un édifice; et d'ailleurs, lorsque le débiteur doit ressentir de l'exécution de son obligation un dommage beaucoup plus considérable que celui que le créancier peut ressentir de l'inexécution, il est de l'équité que le créancier

¹ Martindale v. Smith, 1 Adolph. & Ell. (N. S.) 397; Post, § 416.

§ 414. In the next place, the vendee has, under certain circumstances, a right to rescind a contract of sale, and this consideration will form the subject for the next chapter.

se contente d'être indemnisé de ce qu'il souffre de l'inexécution, par une condamnation de dommages et intérêts, et qu'il ne puisse contraindre, en ce cas, le débiteur à l'exécution précise d'obligation."

CHAPTER XIV.

ON RESCINDING THE CONTRACT OF SALE.

§ 415. EVERY contract, in its origin, depends for its validity upon the mutual assent of the parties to a distinct and definite proposition, embodying certain terms; and in its execution, those terms must be complied with by both parties, or the non-compliance by one in any essential particular, will entitle the other to repudiate the whole contract. The right of either party to rescind a contract is, therefore, in the absence of fraud, dependent solely upon the agreement of the parties, and springs either from the original terms of the contract, or from a subsequent mutual assent to break it up.

§ 416. Where there is no express or implied warranty, and no agreement entitling the vendee to return the goods, the contract is governed by the maxim *caveat emptor*; and the vendee can neither return the goods nor rescind the contract, nor refuse to pay the price agreed upon, merely upon the ground that they are not satisfactory, or that the bargain is a bad one.¹ So, also, where the property has once passed to the vendee, the failure of the vendor to pay the price, according to the terms of the agreement, will not entitle the vendor to rescind the contract; and if, in such a case, the property should

¹ *Clare v. Maynard*, 7 Carr. & Payne, 241; S. C. 1 Nev. & P. 701; *Chitty on Cont.* 458, a.

remain in the hands of the vendor, as agent of the vendee, and he should undertake, upon failure of the vendee to comply with the terms of the contract, to sell them, he would be liable in *trover* for a conversion of the goods.¹

§ 417. If, by the special terms of the contract, the vendee be at liberty to return the goods sold, he may rescind the contract, and bring an action for money had and received; or he may plead a return of the goods, as a complete answer to an action for the price.² And in all such cases, an offer to return the goods is considered as equivalent to an actual return.³ Thus, where A bought and paid for a horse and chaise, upon the express condition that, if his wife should not approve of it, he should be entitled to return it, paying three and sixpence *per diem* for the hire of them, during such time as he should keep them, and at the end of three days, he returned them, and tendered the hire, and the vendor refused to receive them, or return the money,—upon an action for money had and received, A was held to be entitled to recover, upon the ground, that the vendee had, by virtue of the terms of contract, a right to rescind it by returning the articles, and that the refusal to accept them by the vendor did not prejudice his right to bring the action.⁴ This rule applies to all sales “on trial,” or on “sale and return,” or “on approval,” or wherever the actual completion of the contract and acceptance by the vendee

¹ *Martindale v. Smith*, 1 Adolph. & Ell. N. S. 397; S. C. 1 Gale & Dav. 1.

² *Thornton v. Wynn*, 12 Wheat. R. 193; *Street v. Blay*, 2 Barn. & Adolph. 462; *Towers v. Barrett*, 1 T. R. 123; *Weston v. Downes*, Doug. R. 23; *Grounsell v. Lamb*, 1 Mees. & Welsb. 352.

³ *Towers v. Barrett*, 1 T. R. 136; *Thornton v. Wynn*, 12 Wheat. R. 192; *Coolidge v. Brigham*, 1 Metc. R. 550; *Street v. Blay*, 2 Barn. & Adolph. 462; *Morill v. Aden*, 19 Vermt. (4 Washb.) R. 505.

⁴ *Towers v. Barrett*, 1 T. R. 123.

depends, by the terms of the agreement, upon a condition precedent.

§ 417 *a*. Where either party would rescind a contract, he must either return, or offer to return, to the other, all the subject-matter of sale, and must, in as far as he is able, restore him to the position in which he was before the contract was made.¹ An offer to return is not, however, necessary, when the goods are utterly worthless.²

§ 418. Where, therefore, there is a sale by sample, in which the condition is that the bulk of the commodity shall correspond to the sample, the vendee may rescind the contract, and return the goods, upon a breach of such condition, provided he return them within a reasonable time, and do not exercise over them acts of ownership.³ So, also, where goods are sold by sample, the buyer has a right to inspect the whole in bulk at any proper and convenient time; and if the seller refuse to show them, the buyer may rescind the contract immediately.⁴

§ 419. Again, although, by the terms of the contract, the vendee is not entitled to return the goods, nor the vendor to receive them, yet, if the vendee do actually return the goods, and the vendor do actually accept them, unconditionally, the contract is rescinded by mutual agreement, and the vendee may bring his action for money had and received, if the price

¹ *Voorhees v. Earl*, 2 Hill. R. 288; *Masson v. Bovet*, 1 Denio. R. 69; *Ferguson v. Oliver*, 8 Smedes & Marsh. R. 332; *Christy v. Cummins*, 3 McLean R. 386. See Story on Contracts, § 977.

² *Christy v. Cummins*, 3 McLean, R. 386.

³ *Street v. Blay*, 2 Barn. & Adolph. 463; *Okell v. Smith*, 1 Stark. N. P. C. 107; *Sanders v. Jameson*, 2 Car. & Kerw. 557.

⁴ See *Ante*, § 376; *Lorymer v. Smith*, 7 Barn. & Cres. 1; *Toulmin v. Hedley*, 2 Car. & Kir. 157.

be paid.¹ So, also, if the vendor receive back the goods, under protest that he does not thereby disclaim his right to insist on performance by the vendee, or that he takes them "without prejudice;" but, nevertheless, he undertakes to exercise acts of ownership over them,—as by using or offering them for sale,—the contract will be considered as rescinded.² This rule is, however, limited to cases where no rights of third persons have attached to the goods sold; for, if they have been attached by a creditor of the vendee, or if the vendee have become bankrupt, the vendor could not make any claim to the goods, nor could the vendee return them, since it would amount to an undue preference of the vendor over his other creditors.³

§ 420. Again, where the vendor is guilty of fraudulent misrepresentation or concealment as to an essential inducement to the contract, the vendee would, on discovery thereof, have a right to rescind the contract, although no special agreement were contained therein, authorizing him to rescind; for fraud, in all cases, gives the party defrauded a right utterly to reject the contract.⁴ So, also, if there be a material misdescription going to the essence of the contract, the purchaser would be

¹ *Smith v. Field*, 5 T. R. 402; *Thornton v. Wynn*, 12 Wheat. R. 193; *Street v. Blay*, 2 Barn. & Adolph. 462. So, also, in the Civil Law. *Pothier de Vente*, No. 328, 329.

² *Long v. Preston*, 2 Moore & Payne, 262.

³ *Smith v. Field*, 5 T. R. 402.

⁴ *Lewis v. Cosgrave*, 2 Taunt. R. 2; *Abbott v. Barry*, 5 Moore, R. 98; S. C. 2 Ball & Beat. 369; Ante § 159, 165; *Holbrook v. Burt*, 22 Pick. R. 546; *Thurston v. Blanchard*, 22 Pick. R. 18; *Perley v. Balch*, 23 Pick. R. 283; *Cunningham v. Kimball*, 4 Mass. R. 502; *Campbell v. Fleming*, 3 Nev. & Mann. 834; S. C. 1 Adolph. & Ell. 40; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Bradley v. Bosley*, 1 Barb. Ch. R. 125; *Camp v. Pulver*, 5 Barb. Sup. Ct. R. 91; *Hitchcock v. Covell*, 23 Wend. R. 611; *Hoffman v. Noble*, 6 Metcalf. R. 68; *Harrington v. Wells*, 12 Verm. R. 505; *Thayer v. Turner*, 8 Metcalf. R. 522.

entitled to rescind the contract, although the misstatement were neither wilful nor designed.¹ But if he elect to rescind, he must do so within reasonable time ; and if he do any thing to affirm the sale, after a full knowledge of the facts, or if either be induced by his dilatoriness to act, his right to disaffirm the sale and reclaim the goods is gone.² If, therefore, the party who is induced to purchase by the fraud and deceit of the seller, after discovering the fraud, continue to deal with the article sold as his own, or to retain it for an unreasonable length of time, he cannot nullify the contract and recover money which

¹ *Flight v. Booth*, 1 Bing. N. C. 377. In this case, Ch. J. Tindal said : "It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud ; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases ; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only ; *Duke of Norfolk v. Worthy*, 1 Campb. R. 340 ; *Wright v. Wilson*, 1 Mood. & Rob. 207 ; whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale ; *Jones v. Edney*, 3 Campb. R. 284 ; *Waring v. Haggart*, 1 Ry. & Mood. 39 ; and *Stewart v. Alliston*, 1 Mer. R. 26. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

² *Hoffman v. Noble*, 6 Metcalf. R. 74. See, also, *Hodgden v. Hubbard*, 18 Vermt. (3 Washb.) R. 501 ; *Johnson v. Peck*, 1 Woodb. & Mint. C. C. R. 334.

he has already paid thereon. Nor is his right to repudiate the contract revived by the subsequent discovery of a new incident in the same fraud.¹ The same rule, also applies, of course, to the vendor, in cases of fraud by the vendee. Thus, if a vendee, under terms to pay for goods on delivery, obtain possession of them by giving a check, which is afterwards dishonored, he gains no property in the goods,—if, at the time of giving the check, he had no reasonable ground to expect it would be paid.²

§ 421. In cases of warranty, where the whole of the goods bargained for are delivered, if there be neither a special agreement entitling the vendee to return the goods; nor an actual return and acceptance by the vendor; nor fraud; the right of the vendee to rescind the contract depends upon whether the contract has been executed, and the goods actually accepted by the vendee,—or whether it is executory, and the goods have not been accepted by him. If the contract be executed, and the goods be completely accepted, so as to pass the property therein to the vendee, he cannot elect to rescind the contract and return the goods, after actually receiving them, so as to entitle him to bring an action for money had and received; but he must declare specially on his warranty.³ But if, before the

¹ *Campbell v. Fleming*, 3 Nev. & Man. 834; S. C. 1 Adolph. & Ell. 40.

² *Hawse v. Crowe, Ry. & Mood*. 414.

³ *Towers v. Barrett*, 1 T. R. 133; *Gompertz v. Denton*, 1 Car. & Payne, 207; *Weston v. Downes*, Doug. R. 23; *Power v. Wells*, Doug. R. 24; S. C. Cowp. R. 818; *Thornton v. Wynn*, 12 Wheat. R. 183; *Payne v. Whale*, 7 East. R. 274; *Street v. Blay*, 2 Barn. & Adolph. 462; *James v. Cotton*, 5 Moore & Payne, 26; *Fortune v. Leagham*, 2 Camp. R. 416; *Solomon v. Turner*, 1 Stark. R. 51; *Miner v. Bradlee*, 22 Pick. R. 458; *Williams v. Hurt*, 2 Humph. (Tenn.) R. 68; *Kase v. John*, 10 Watts R. 107; *Kimball v. Cunningham*, 4 Mass. R. 502; *West v. Cutting*, 19 Vermt. (4 Washburn) R. 536; *Freeman v. Cluty*, 3 Barb. Sup. Ct. R. 424; *Voorhees v. Earl*, 2 Hill. R. 288; *Thornton v. Wynn*, 12 Wheat. R. 192. But see *Curtis v. Hannay*, 3 Esp. R. 83; Stark. Evid. 1st ed., part 4, p. 645.

arrival of the goods, the vendee become insolvent, he may refuse to receive them, and return them to the vendor, provided the vendor assent.¹ Thus, where the plaintiff gave a horse and twenty guineas to the defendant for another horse, which was warranted to be sound, but which the plaintiff, after accepting and using, discovered not to be sound, and made an offer to return the horse, which the defendant refused; it was held, that he could not maintain the action for money had and received,—as that action could only be brought upon the rescinding of the contract, which the plaintiff had no right to do,—there being no special agreement to that effect.²

§ 422. But where the contract is executory,—as if an article be ordered to be supplied for a particular use, or to be manufactured for a particular purpose, and the article sent does not correspond to the order,—the vendee may, upon discovery of the defect, return it and rescind the contract; provided he do so within reasonable time; and provided the parties can be reinstated in their former position.³ The distinction between this class of cases and the former is, that in the former, when a specific article is bought, paid for, and received, the contract is entirely completed, and the property passed to the vendee by his mere reception of the goods; while, in the latter class, where an article is ordered to be furnished or manufactured, the contract is open, and the property does not pass until the vendee has a fair opportunity for examination and trial.⁴

¹ *Harman v. Fisher*, Cowp. R. 125; *Dixon v. Baldwin*, 15 East. R. 176.

² *Power v. Wells*, Doug. R. 24; *S. C.* Cowp. R. 818; commented on in *Towers v. Barrett*, 1 T. R. 133; and in *Thornton v. Wynn*, 2 Wheat. R. 183.

³ *Street v. Blay*, 2 Barn. & Adolph. 463; *Adams v. Richards*, 2 H. Black. R. 573; *Okell v. Smith*, 1 Stark. 107; *Freeman v. Clute*, 3 Barb. Sup. Ct. R. 434. See *Ante*, § 200, 201.

⁴ However well established this distinction may be, it seems to fail of a sufficient reason to support it on principle. All that can be said is that it is

§ 422 *a*. But where a person buys a specific cargo of goods expected by a particular ship, and which are warranted to be

so, and therefore it has been so laid down in the text. The true distinction, as it seems to us, would be between an absolute and a conditional contract. If the contract be absolute, there seems to be a sufficient reason why the buyer should not repudiate it, because there is no agreement either express or implied to such effect. But, if it be conditional, it ought, on principle, to make no difference, whether the condition were expressed in special terms, or necessarily implied from the nature and stipulations of the contract. A sale of goods with a warranty is never an absolute sale, it is conditional upon the correspondence of the subject-matter to the warranty; and if such condition be not fulfilled, it is an implied part of the agreement, that the buyer shall not be bound to receive the goods. Indeed, this implied right is the very object of such a contract, and its characteristic feature. To insist, therefore, that a buyer shall take the goods, and shall not be at liberty to return them, is virtually to annul his contract, and to open a way for fraud on the part of the seller. The object of the buyer in requiring a warranty is not to enable him to plead non-compliance therewith by the seller, solely as a ground for a reduction of price, but to ensure to himself a good article, and such as he wants. If the article be not what it is warranted to be, the seller breaks his contract, and the buyer, or principal, ought to be entitled to rescind it. The rule, as it stands, does not conform to the modern doctrine of warranty, and is a relic of the old law. The true principle would seem to be, that the right to rescind depends upon the agreement of the parties, whether it be express or necessarily implied. If the agreement in special terms give a right to the buyer to return the article, he may rescind. If, by necessary implication, the same right is given, as in a case of warranty, why should not the same rule apply? What difference there is in principle, between a case where a buyer orders a manufacturer to supply him with an article for a certain purpose and of a certain kind and quality, and where he buys of a party a similar article, under a warranty, that it shall be of such a kind and quality, and shall be fit for a certain purpose, it is very difficult to perceive. But the rule is so. In each case, it would seem that the same right to rescind would accrue to the buyer; and, if reasonable time be allowed in the one instance for him to make trial and decide, it would seem proper that reasonable time should be allowed to him to do the same in the other. The old strenuous doctrine of *caveat emptor* here seems to cling to the law of warranty, after all its former support has decayed. The rule, which seems to us the truest, is laid down in *Curtis v. Hannay*, 3 Esp. N. P. C. 83, in which Lord Eldon said, "he took it to be clear law, that if a person purchases a horse which is warranted,

of a particular quality, he has a right, on the arrival of the ship, to inspect such cargo before it is delivered to him, in order to

and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value." So, also, this rule is laid down in *Starkie on Evid.* part 4, p. 645. This case is directly overruled in *Street v. Blay*, 2 Barn. & Adolph. 460. In that case, Lord Tenterden said: "It is not necessary to decide, whether in any case the purchaser of a *specific chattel*, who, having had an opportunity of exercising his judgment upon it, has bought it with a warranty that it is of any particular quality or description, and *actually accepted and received* it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that position. Lord Eldon, in the case of *Curtis v. Hannay*, (3 Esp. N. P. C. 83,) is reported to have said, that, 'he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might *return the horse and bring an action to recover the full money paid*; but in the latter case the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;' and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This *dictum* has been adopted in Mr. Starkie's excellent work on the Law of Evidence, part 4, p. 615; and it is there said, that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has

ascertain whether the warranty has been complied with ; and if it has not, he may reject the cargo altogether. But if the cargo

been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. *Weston v. Downes* (1 Doug. 23,) *Towers v. Barrett*, (1 T. R. 133,) *Payne v. Whale*, (7 East, 274,) *Power v. Wells*, (Doug. 24, n.,) and *Emanuel v. Dane*, (3 Camp. 299,) where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration ; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action ; *Cormack v. Gillis*, (7 East, 480,) *King v. Boston*, (7 East, 481, n.) ; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid. It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial. *Okell v. Smith* (1 Stark. N. P. C. 107.) Nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it ; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and com-

be once delivered to him, he has no right to return it, on the ground that it does not correspond with the warranty.¹

§ 423. Again, if the vendor wholly fail to make a title to the vendee in an executory contract, the vendee may rescind the

parison. The observations above stated are intended to apply to the purchase of a certain *specific chattel*, accepted and received by the vendee, and the property in which is completely and entirely vested in him." See, in opposition to this doctrine, the case of *Rutter v. Blake*, 2 Harr. & Johns. 350, where it is decided, that if a merchant buy goods under a warranty of quality, and, without examination, he send them to the West Indies, where upon opening them, he finds them not to be of the quality warranted, he may store them, give notice to the seller, and recover the money paid for them, in an action for money had and received; or he may bring his action on the special agreement of warranty, and recover damages; nor is he obliged to return the goods, nor to put himself to further trouble and expense about them. In *Thornton v. Wynn*, (12 Wheat. R. 193,) however, Mr. Justice Washington, after reviewing the cases, said: "The result of the above cases is this: if, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase-money, or to enable the vendee to maintain an action for money had and received in case the purchase-money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, unconditionally, to take back the property; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase-money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time." By an absolute sale, the Judge must have intended, any sale without an express agreement allowing to the vendee the right to return the goods; and to have considered a sale with warranty as an "absolute sale;" for the case in which this judgment was given was the sale of a horse, with warranty, and he held, that the vendee could not rescind without the consent of the vendor.

¹ *Toulmin v. Hedley*, 2 Carrington & Kirwan, 157.

contract.¹ But, if on an executed contract there be a total failure of title, the vendee is not at liberty to rescind the contract, so long as his possession is undisturbed, unless there were an affirmation of ownership, or an 'express warranty, or fraud.² In case there were an affirmation of title or an express warranty of it, it would seem that he could rescind, and bring an action on the case, treating such affirmation as a technical deceit or as a mistake annulling the contract.³ But whether even in an executory contract a *partial* failure of title would entitle the vendee to rescind it, is a question, in respect to which there is a great diversity in the cases. The rule seems to be, that any partial defect of title, going to the whole subject-matter, — as, if the goods be under mortgage, or incumbrance of any sort, — would entitle the vendee to rescind the contract.⁴ But any defect of title as to a part of the subject-matter, — as, if the vendor only own a portion of the goods sold, — will not, ordinarily, be sufficient at law to enable the vendee to repudiate his contract unless the contract be an entirety, in which case failure of title as to a part is the same as failure as to the whole.⁵ But, if the contract be not entire, but the defect is in respect to an essential part, forming a main inducement to the sale, the seller could not enforce a specific performance in Equity.⁶

¹ *Purvis v. Rayer*, 9 Price, R. 488; *Souter v. Drake*, 5 Barn. & Adolph. 999; *Robinson v. Anderton Peake*, R. 94. Ante, § 367 *b*.

² *Case v. Hall*, 24 Wend. R. 103. Ante, 367 *b*.

³ Bacon, Abr. action on the case, (D,) *Cross v. Gardner*, 1 Showe, R. 68; *Turnis v. Leicester*, Cro. Jac. 474; *Parley v. Freeman*, 3 T. R. 58; *Medina v. Stoughton*, 1 Salk. R. 210; *Allen v. Hammond*, 2 Sumner, R. 394. Ante, § 203, 367.

⁴ 2 Kent, Comm. Lect. 39, p. 469, 470; *Farrer v. Nightingale*, 2 Esp. R. 639; 2 Story, Eq. Jurisp. § 779; *Graham v. Oliver*, 3 Beav. R. 124; *Hiler v. Buckley*, 17 Ves. R. 194; *Paton v. Rogers*, 1 Ves. & Beam. 351.

⁵ *Casamajor v. Strode*, 1 Coop. Sel. Cas. 510; *Roffey v. Shallcross*, 4 Madd. Ch. R. 122; *Johnson v. Johnson*, 3 Bos. & Pul. 162.

⁶ 2 Story, Eq. Jurisp. § 779; *Thomas v. Dering*, 1 Keen, R. 729; *Gra-*

§ 424. So, also, if there be an utter refusal, or a total inability, in the one party, to perform his part of the contract, the other party would be entitled to rescind. Thus, where an unreasonable time has passed without performance, an abandonment of the contract may be made.¹ But a partial failure, by either party, would not, ordinarily, entitle the other to reject the contract. Thus, a failure by the vendee to comply with the exact terms of credit, — or a refusal to accept, or inability to pay for the whole quantity of goods bargained for, — would not give the vendor a right to withdraw wholly from the contract; unless, by the express terms thereof, time or quantity was of the essence of the consideration.² Again, whether a partial delivery of goods to the buyer, or the refusal or neglect of the other party to deliver the remainder, would entitle him to rescind the contract utterly, would depend upon whether the contract were an entirety or not. If the contract be entire, the buyer may refuse to accept a part, and may rescind the contract upon returning, or offering to return, the goods.³ But, if either party accept a partial fulfilment, he thereby destroys the entirety of the contract, and cannot rescind. Thus, if the seller accept payment for a portion of the goods, and not in course of receiving the whole, and with a view thereto, he cannot annul wholly his contract. So, if the buyer actually accept a part, as a part, and not in course of receiving the whole; or if he retain a part delivered, after the seller has failed in delivering the whole within the time specified in the contract; he

ham v. Oliver, 3 Beav. R. 124; Paton v. Rogers, 1 Ves. & Beam. 351; Drewe v. Hanson, 6 Ves. R. 678; Ante, § 205.

¹ Lawrence v. Knowles, 1 Scott, R. 381; S. C. 5 Bing. N. C. 399; Benson v. Lamb, 9 Beavan, R. 502.

² Martindale v. Smith, 1 Adolph. & Ell. N. S. 389; S. C. 1 Gale & D. 1.

³ Waddington v. Oliver, 2 Bos. & Pul. N. R. 61; Walker v. Dixon, 2 Stark. R. 281; Giles v. Edwards, 7 T. R. 181; Bragg v. Cole, 6 Moore, R. 114. See, also, Pothier de Vente, No. 338.

cannot, upon the failure of the vendor to comply with the terms as to the remainder, claim to rescind the contract altogether, but is bound to pay for what he has received.¹ Thus, where the seller of two hundred and fifty bushels of wheat, to be delivered within a certain time, delivered one hundred and thirty bushels only, which the purchaser accepted, and retained after the expiration of the stipulated time for delivery; it was held, that the seller could recover the price of the part delivered. But, where² the plaintiff, having contracted for the sale of one hundred sacks of flour, at 94s. 6d. per sack, delivered part, but refused to deliver the residue, the defendant being willing to receive and pay for the whole; it was held, that the plaintiff could not recover for the part delivered, the defendant having a right to rescind.³ Where, however, the contract is not entire, and the quantity or time of delivery is not of the essence of the contract, and there may be a compensation in damages for the deficiency, a partial failure of performance by the seller will not alone entitle the vendee to rescind the contract; but he must resort to his special action on the contract for damages.⁴ Of course, if there be any special agreement, by which either party is, in such case, entitled to rescind the contract, upon a non-compliance by the other with certain terms, it supplies the rule of the case.

§ 425. Again, where a bill of exchange or a promissory note

¹ *Miner v. Bradlee*, 22 Pick. R. 457; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; *Walker v. Dixon*, 2 Stark. R. 281; *Bowker v. Hoyt*, 18 Pick. R. 555; *Champion v. Short*, 1 Camp. R. 53; *Bragg v. Cole*, 6 Moore, R. 114; *Shaw v. Badger*, 12 Serg. & Rawle, 275.

² *Oxendale v. Wetherell*, 9 Barn. & Cres. 386.

³ *Walker v. Dixon*, 2 Stark. R. 281.

⁴ *Franklin v. Miller*, 4 Adolph. & Ell. 559, 605; *Boone v. Eyre*, 1 H. Black. R. 270, note (a); *Street v. Blay*, 2 Barn. & Adolph. 461; *Davis v. Street*, 1 Car. & Payne, 18; *Damer v. Langton*, 1 Car. & Payne, 158; *Weston v. Downes*, 1 Doug. R. 23; *Mavor v. Pyne*, 3 Bing. R. 285.

has been given for goods warranted to be of a particular quality or description, and they prove to be absolutely worthless, so that there is a total failure of consideration, the vendee would be entitled to rescind the contract, and the vendor could not recover in an action on the promissory note or bill. But, if they merely prove to be of an inferior quality or description, the vendee cannot rescind, and cannot give evidence of their inferiority in reduction of the price, in an action on such note or bill, but is put to his cross action on the warranty.¹ The distinction is between a total want of consideration and a partial failure of consideration. And the reason for the rule is, that, as the note or bill is in its nature entire, the defence to it must be entire, and go to the whole claim; and that any different rule would tend to great inconvenience and confusion of rights.²

§ 426. The question here arises, as to what is the duty of the vendee, in order to rescind a contract, in cases where he is privileged so to do. And, in the first place, he is ordinarily bound to return the goods within a reasonable time. What constitutes reasonable time, of course, depends upon the circumstances of each particular case, and cannot be reduced to any precise rule; but sufficient time is always allowed to enable the vendee to make a fair trial of the article. He must, however, be careful not to keep them for an unreasonable length of time, or he will lose all right to rescind the contract.³

¹ *Tye v. Gwynne*, 2 Camp. R. 346; *Moggridge v. Jones*, 14 East, R. 486; *Morgan v. Richardson*, 1 Campb. R. 40, note; *Parish v. Stone*, 14 Pick. R. 209; *Grant v. Welchman*, 16 East, R. 206; *Obbard v. Belham*, M. & M. 483; *Solomon v. Turner*, 1 Stark. R. 51; *Day v. Nix*, 9 Moore, R. 159; *Perley v. Balch*, 23 Pick. R. 2-3; *Shepherd v. Temple*, 3 N. Hamp. R. 455; *Beecker v. Vrooman*, 13 Johns. R. 302.

² *Ibid.*

³ *Milner v. Tucker*, 1 Car. & Payne, 15; *Grimaldi v. White*, 4 Esp. N. P. C. 95; *Lawrence v. Knowles*, 7 Scott, R. 381; *S. C.* 5 Bing. N. C. 399.

Thus, where a party kept and used a chandelier for six months, he was held to be bound to pay what it was worth, although it did not exactly correspond to his order.¹ So, also, where a painting was ordered, to be executed conformably to a specimen, and the buyer did not return it: it was held, that he should have returned it if he had intended to rescind the contract.² In all cases, however, where the buyer is entitled to rescind a contract of sale, an offer to return is considered as equivalent to a return, although it be not accepted by the vendor.³

§ 427. Again, unless under a special contract to the contrary, neither party can rescind a contract, without replacing the other in the same position in respect to the goods as he occupied before the delivery of the article, nor without rescinding *in toto*.⁴ The buyer, therefore, cannot rescind the contract without offering not only to return the goods, but to return them in as good condition as when they were sent, subject to the use required in order to make proper trial, and as soon as he knows of their insufficiency; for if he keep them for an unreasonable length of time, or if he make improper use of them, or if he exercise any rights of ownership over them,—as by offering them for sale,—he cannot rescind the contract.⁵

¹ *Milner v. Tucker*, 1 Car. & Payne, 15.

² *Grimaldi v. White*, 4 Esp. N. P. C. 95.

³ *Towers v. Barrett*, 1 T. R. 136; *Thornton v. Wynn*, 12 Wheat. R. 192; *Coolidge v. Brigham*, 1 Metcalf, R. 550; *Street v. Blay*, 2 Barn. & Adolph. 462.

⁴ *Towers v. Barrett*, 1 T. R. 133; *Hunt v. Silk*, 5 East, R. 449; *Reed v. Blandford*, 2 Younge & Jerv. 278; *Cash v. Giles*, 3 Car. & Payne, 407; *Street v. Blay*, 2 Barn. & Adolph. 456; *Percival v. Blake*, 2 Car. & Payne, 514; *Hopkins v. Appleby*, 1 Stark, R. 477; *Coolidge v. Brigham*, 1 Metcalf, R. 550; *Holbrook v. Burt*, 22 Pick. R. 546; *Conner v. Henderson*, 15 Mass. R. 319; *Perley v. Balch*, 23 Pick. 283; *Thurston v. Blanchard*, 22 Pick. R. 18, 20; *Brinley v. Tibbetts*, 7 Greenl. R. 70.

⁵ *Ibid.*; *Fisher v. Samuda*, 1 Camp. R. 190; *Groning v. Mendham*,

Thus, where A, being a soap-boiler, bought a certain quantity of barilla, and used it in eight successive boilings, without complaint; it was held, that he must pay the full price.¹ There is, however, one exception to this rule, which obtains, whenever the goods prove to be utterly worthless, in which cases the vendee is not obliged to return, or to offer to return.²

§ 428. Where *earnest* is given on a contract of sale, the old rule was, that if the buyer repented of his bargain he might refuse to fulfil it, upon forfeiting to the seller the whole earnest money deposited. But if the failure to comply with the contract was on the part of the vendor, he was bound to make two-fold restitution to the vendee.³ This rule does not apply to a part-payment made for goods bargained for, but only to money paid as earnest, or forfeit money. The same rule obtains in the Roman Law, from which it was probably copied, and in the civil law of France.⁴ If, however, the contract be not rescinded, it is the duty of the party to return the earnest-money, or to receive it as part payment, and if it be any thing

1 Stark. R. 257; Milner v. Tucker, 1 Car. & Payne, 15; Street v. Blay, 2 Barn. & Adolph. 461; Okell v. Smith, 1 Stark. R. 107; Grimaldi v. White, 4 Esp. N. P. C. 95; Parker v. Palmer, 4 Barn. & Ald. 387; Poulton v. Lattimore, 9 Barn. & Cres. 259; Cash v. Giles, 3 Car. & Payne, 407; Thurston v. Blanchard, 22 Pick. R. 20; Kimball v. Cunningham, 4 Mass. R. 502; Boorman v. Johnson, 12 Wend. R. 566; Sands v. Taylor, 5 Johns. R. 395. But see *contra*, as to the necessity of returning goods, Rutter v. Blake, 2 Harr. & John. 350; Patteshall v. Tranter, 3 Adolph. & Ell. 103; Fielden v. Starkin, 1 H. Black. R. 17.

¹ Hopkins v. Appleby, 1 Stark. R. 477.

² Poulton v. Lattimore, 9 Barn. & Cres. 259; Conner v. Henderson, 15 Mass. R. 322; Perley v. Balch, 23 Pick. R. 283; Shepherd v. Temple, 3 N. Hamp. R. 455; Beecker v. Vrooman, 13 Johns. R. 302; Knapp v. Lee, 3 Pick. R. 457; Dickinson v. Hall, 14 Pick. R. 217; Donelson v. Young, 1 Meigs, R. 155; Taft v. Wildman, 15 Ohio, R. 123.

³ Bracton, l. 2, c. 27.

⁴ Inst. l. 3, tit. 21; Pothier de Vente, No. 498, Dig. 18, l. 35.

else than money he is bound to return it.¹ The only effect of earnest is, to bind the bargain, but it does not absolutely change the property in the goods. Where it is given, the vendor cannot sell the goods to another without a default in the vendee; and, therefore, if the vendee do not come and take the goods, the vendor should go and request him; and then, if he do not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.²

¹ Pothier de Vente, No. 507, Dig. 19, l. 11, § 6.

² *Langfort v. Tiler*, 1 Salk. R. 113; *Goodall v. Skelton*, 2 H. Black. R. 316; *Hinde v. Whitehouse*, 7 East, R. 571; *Knight v. Hopper*, Skinner, R. 647; *Girard v. Taggart*, 5 Serg. & Rawle, 19; *Neil v. Cheves*, 1 Bailey, S. C. R. 537; 2 Kent, Comm. Lect. 39, p. 495; *Maclean v. Dunn*, 4 Bing. R. 722. But see *Greaves v. Ashlin*, 3 Camp. R. 426.

CHAPTER XV.

OF THE REMEDIES FOR A BREACH OF THE CONTRACT OF SALE, AND
THE DAMAGES RECOVERABLE.

§ 429. THE next subject, which naturally suggest itself for consideration, is the remedies which either party has against the other for Breach of the Contract of Sale.

§ 430. Before proceeding to consider the circumstances, under which either party may sue the other, it may be as well to state the different actions usually employed by the buyer and seller, — as the rights of either party to recover will very often depend solely upon the form of action which is brought. Where the party complaining has a *property* in the goods, as well as a remedy against the person, — a *jus in rem* as well as a *jus in personam*, — he may maintain *trover*, which is founded upon a wrongful conversion, either actual or presumptive, by the party in possession, and the object of which is to recover the goods themselves; or he may sue the other in *assumpsit* for damages occasioned by the breach of contract. If he only have a remedy against the person, and no property in the goods, his action must be *assumpsit*, which is founded upon the promise of the other. The question by which the right to bring either action is tested, — is, whether the title to the property has been transferred or not. If it be not transferred, *assumpsit* is the only remedy; if it be transferred, either *trover* or *assumpsit* may be brought.

§ 431. The remedy of each party is, ordinarily, by an action of *indebitatus assumpsit*, which is a form by which indebtment is alleged in general terms ; or by a special action of *assumpsit* in which the declaration is upon the special terms of the contract. So long as the contract remains open and unrescinded, the party can only declare specially thereon for damages, and cannot declare simply for money had and received ; but if the contract be rescinded, he may bring an action for money had and received, to recover the price, if it be paid.¹ In an action, therefore, for a breach of warranty to recover the price after the goods have been returned, the general form of *indebitatus assumpsit* is sufficient ; but, if the vendee still retain the goods, he must declare specially on the warranty.²

§ 432. Again, where there has been fraud or misrepresentation going to the foundation of the whole contract, — or a *total* failure of title, or of value, — or, indeed, wherever there has been any nonfeasance, misfeasance, or malfeasance, by which injury is occasioned to either party, — he may bring an action on the case therefor.³ Case is, however, an improper action, unless the injury complained of go to the *whole* contract, for as the plea is the general issue, the plaintiff is put upon proof of the whole of the allegations in his declaration,

¹ *Towers v. Barrett*, 1 T. R. 133 ; *Gomportz v. Denton*, 1 Car. & Payne, 207 ; *Weston v. Downes*, Dougl. R. 124 ; *S. C. Cowp. R.* 818 ; *Thornton v. Wynn*, 12 Wheat. R. 183 ; *Payne v. Whale*, 7 East, R. 271 ; *Street v. Blay*, 2 Barn. & Adolph. 462 ; *Power v. Wells*, Dougl. R. 24 ; *Connor v. Henderson*, 15 Mass. 319 ; *Kimball v. Cunningham*, 4 Mass. R. 502 ; *Gordon v. Martin*, Fitzg. R. 302 ; *Mussen v. Price*, 4 East. R. 147 ; *Lyons v. Barnes*, 2 Stark. R. 39.

² *Ibid* ; *Waddington v. Oliver*, 2 Bos. & Pul. N. R. 61 ; *Towers v. Barrett*, 1 T. R. 133 ; *Street v. Blay*, 2 Barn. & Adolph. 462.

³ *Hawkins v. Appleby*, 2 Sandf. Sup. Ct. R. 421.

and the defendant is at liberty to avail himself of any matter of defence at the trial.¹

§ 433. The ordinary remedy of the seller in sales for cash, is by the general form of *indebitatus assumpsit* for goods sold and delivered in cases where an actual delivery has been made; or for goods bargained and sold, when the seller retains the goods, but is ready to deliver them on payment.² But, if no sale have actually taken place, — as, where a commodity has been ordered, but never specifically adopted by the orderer, there must be a special declaration on the contract against him for refusing to comply with the contract.³

§ 434. If the sale be not for cash, but credit be either given absolutely for a certain period, or with the intermediate negotiable security of a promissory note or bill of exchange, the seller cannot bring his action against the purchaser, until the period of credit has expired, or until the note or bill has arrived at maturity.⁴ But, after such time, he may, upon the refusal of the vendee to pay for the goods, or to honor the draft or note, bring a special action for breach of contract; but he should not sue in general form for the price. So, also, if credit be given for a certain time, after which a note is to be given for a still further time, — as, if goods be sold, to be paid for in

¹ 1 Chitty on Plead. 147; *Horncastle v. Moat*, 1 Car. & Payne, 166; *Ayer v. Bartlett*, 9 Pick. R. 160; *Salem India Rubber Co. v. Adams*, 23 Pick. R. 256; *Williamson v. Alison*, 2 East. R. 451; *Chandelor v. Lopus*, Cro. Jac. 4.

² *Atkinson v. Bell*, 8 Barn. & Cres. 277; *Alexander v. Gardner*, 1 Scott, R. 281, 630; S. C. 1 Bing. N. C. 671; *Wetherby v. Barnham*, 5 Car. & Payne, 228.

³ *Ibid.*

⁴ *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Read v. Hutchinson*, 3 Camp. R. 352; *De Symons v. Minchwich*, 1 Esp. R. 430. See Post, § 441, 442, 443.

two months, by a bill at two months, the seller is bound to wait until the expiration of the four months before he can bring *indebitatus assumpsit*.¹ But he can bring a special action for damages, upon the failure of the vendee to give the bill or note after the expiration of two months.² So, also, although credit be given, the seller may disaffirm the contract, on the ground of fraud, and bring *trover*.³ But he cannot bring *assumpsit*, because he thereby affirms the contract by which credit is given.⁴

§ 435. We now come to the consideration of the particular circumstances which authorize either party to bring his action, and to the remedies which are appropriate for breaches of the contract, at its different stages, from inception to completion.

§ 436. And first, as to the remedies of the seller against the buyer. If, after the bargain has been completely closed, so as to pass the title to the vendee, and the vendor is ready to deliver the goods according to the agreement, the vendee neglect or refuse to take them, at the place and within the time appointed by the contract, — or, in case no time or place be appointed within reasonable time, and at the place where they were bought, or some reasonable place, — the vendor may recover the price in an action for goods bargained and sold; or, if no price be fixed, he may recover their market value at the

¹ *Mussen v. Price*, 4 East, 147; *Miller v. Shawe*, cited 4 East, R. 149; *Dutton v. Solomonson*, 3 Bos. & Pul. 580; *Helps v. Winterbottom*, 2 Barn. & Adolph. 431; *Strutt v. Smith*, 1 Crompt. Mees. & Rosc. 312; *Price v. Nixon*, 5 Taunt. R. 338.

² *Mussen v. Price*, 4 East, R. 147.

³ *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Read v. Hutchinson*, 3 Campb. R. 352. See Post, § 442.

⁴ *Ibid*.

time and place of delivery.¹ So, also, he may, under such circumstances, resell the goods at auction, after giving due notice to the buyer of his intention ; and in a special action for damages he may recover the difference between the contract price and the net proceeds of the second sale ; and, in the absence of any agreement as to price, he may recover the difference between the net proceeds and the market value of the goods, at the time of the completion of the contract, which will, ordinarily, be when they are delivered.² So, also, he may recover compensation for any additional expense, or injury, or loss, occasioned by the non-performance of the contract, — as, if he be obliged to re-store the goods, or if he be forced to give them place in his warehouse to the exclusion of other goods. And, indeed, whenever he gives notice to the vendee, he may recover warehouse rent for the storage of the goods, during such time as would be reasonably required to enable him to resell to advantage, — but for no longer time.³

§ 436 *a*. There is no necessity that the resale by the vendee should be made by auction, or in any particular mode. All that is required of him is, that he shall dispose of the goods on

¹ *Maclean v. Dunn*, 4 Bing. R. 728 ; *Langfort v. Tiler*, 1 Salk. R. 112 ; *Sands v. Taylor*, 5 Johns. R. 395 ; *Adams v. Minick*, cited in 5 Serg. & Rawle, 32 ; 2 Kent, Comm. Lect. 39, p. 505 ; *Boulton v. Arnott*, 3 Tyrw. R. 267 ; S. C. 1 Crompt. & Mees. 333 ; *Gregory v. McDowel*, 8 Wend. R. 435 ; *Dey v. Dox*, 9 Wend. R. 129.

² *Ibid.* ; *Boulton v. Arnott*, 3 Tyrw. R. 267 ; S. C. Crompt. & Mees. 333 ; *Boorman v. Nash*, 9 Barn. & Cres. 315 ; *Maclean v. Dunn*, 4 Bing. R. 728 ; *Hagedorn v. Laing*, 6 Taunt. R. 162 ; *Crooks v. Moore*, 1 Sand. S. C. R. 297.

³ *Chesterman v. Lamb*, 2 Adolph. & Ell. 129 ; S. C. 4 Nev. & Man. 195 ; *McKenzie v. Hancock*, Ry. & Mood. 436 ; 1 Selwyn's Nisi Prius, 657, tit. Deceit. I. 2.

the resale in good faith, and in the mode best calculated to produce their value.¹

§ 437. In respect to the seller's right to resell, it makes no difference whether the goods be of a perishable nature or not, since the market value is liable to diminution, and this would, in a measure, produce the same result as if the goods should deteriorate.² But if the vendor do resell, he should bring a special action for damages on the contract, and should not sue on the general count for goods sold and delivered.³

§ 438. When the property of the goods has not vested in the vendee, and he refuses to take them, the vendor may, by a special action on the contract, recover the difference between the contract price and the market value of the goods, at the time and place, when and where the contract was broken.⁴ This rule applies to cases where a person contracts to supply goods to order, to be delivered at a future day, at a certain price, and before the arrival of such day, the buyer becomes bankrupt, — or where the goods are in the process of carriage by an agent solely of the vendor, and are stopped by him before delivery.

§ 439. If the goods delivered by the vendor do not correspond to his agreement, but are retained by the vendee, the vendor can only recover the actual worth of the article at the time and place of delivery, in an action for goods sold and

¹ *Crooks v. Moore*, 1 Sandf. S. C. R. 297.

² *Maclean v. Dunn*, 4 Bing. R. 728.

³ *Ibid.*

⁴ 1 Chitt. Plead. (6th ed.) 347; *Philpotts v. Evans*, 5 Mees. & Welsb. 475; *Boorman v. Nash*, 9 Barn. & Cres. 145; *Leigh v. Patterson*, 8 Taunt. R. 540; *Gainsford v. Carroll*, 2 Barn. & Cres. 621; *Gregory v. McDowel*, 8 Wend. R. 435; *Dey v. Cox*, 9 Wend. R. 129.

delivered, — although a contract price have been fixed.¹ So, also, if the contract be entire, and the seller deliver only a part of the goods bargained for, and the vendee retain such part, the vendor may recover the value of the part retained, in an action for goods sold and delivered.²

§ 440. In the next place, if the vendee receive the goods, but refuse to pay for them, the vendor may, if the title to the property be not absolutely transferred, reclaim the specific goods in an action of *trover*. Thus, if the sale be made on condition, that unless the goods are paid for, or unless some act be performed by the buyer by a certain day, no property therein shall pass, — upon the lapse of the time, the seller can reclaim the goods in an action of *trover*.

§ 441. If the title be passed to the vendee, and he accepts the goods, but refuses to pay for them, according to the terms of his agreement, the remedy of the seller is by an action for goods sold and delivered, or by a special action on the contract, by which he can recover the actual price agreed.³ The damages recoverable by the vendor in this position of the parties, are the same as if the vendor refuses to receive the goods ; but the

¹ *Street v. Blay*, 3 Barn. & Adolph. 456 ; *Poulton v. Lattimore*, 9 Barn. & Cres. 265 ; *Okell v. Smith*, 1 Stark. R. 107 ; *Cousin v. Paddon*, 1 Gale, R. 305 ; *Chapel v. Hicks*, 2 Crompt. & Mees. 214 ; S. C. 4 Tyrw. 43 ; *Grounsell v. Lamb*, 1 Mees. & Welsb. 352 ; *Waring v. Mason*, 18 Wend. R. 425 ; *Havelock v. Geddes*, 10 East, R. 564 ; *Baillie v. Kell*, 6 Scott, R. 379 ; S. C. 4 Bing. N. C. 638 ; *Miller v. Smith*, 1 Mason, R. 437.

² *Roberts v. Beatty*, 2 Penns. R. 63 ; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386 ; *Mavor v. Pyne*, 3 Bing. R. 285 ; *Shipton v. Casson*, 5 Barn. & Cres. 378 ; *Bragg v. Cole*, 6 Moore, R. 114.

³ *Hoadley v. McLean*, 10 Bing. R. 512 ; S. C. 4 Moore & Scott, 340 ; *Bluett v. Osborne*, 1 Stark. R. 381 ; *Clunnez v. Pezzy*, 1 Camp. R. 8 ; *Bastion v. Butter*, 7 East, R. 483 ; *Harrison v. Allen*, 2 Bing. R. 4 ; S. C. 1 Carr. & Payne, 235 ; *Bailey v. Gouldsmith*, Peake, R. 56 ; *Farnsworth v. Sarrard*, 1 Camp. R. 36.

remedy must be either by a special action to recover the contract price, or by an action for goods sold and delivered, to recover the worth of the goods, and not by an action for goods bargained and sold.¹

§ 442. Where credit has been given for a certain time, the vendor may, after the expiration of such time, but not before, bring an action of *indebitatus assumpsit*, to recover the price and interest thereon from the time it was payable.² So, also, if a bill of exchange or a promissory note be taken by the vendor, so long as the bill or note is current, an action for the price is not maintainable, unless in cases of fraud, when the form of the action should be *trover*.³ Nor does it make any difference in this respect, that the vendor have lost the bill, provided it be indorsed so as to render it negotiable; for the vendee may, nevertheless, be liable on it in the hands of the finder.⁴ But if it be not rendered negotiable, the loss of the bill will not prevent the vendor, on the expiration of the credit, from suing the vendee for its amount.⁵

§ 443. Again, after the time of credit given by the bill or note has expired, the vendor may, upon the default of the ven-

¹ Ibid.

² *Swancott v. Westgarth*, 4 East, R. 75; *Hall v. Odber*, 11 East, R. 118; *Brooke v. White*, 1 Bos. & Pul. N. R. 330; *Helps v. Winterbottom*, 2 Barn. & Adolph. 401; *Farr v. Ward*, 3 Mees. & Welsb. 25; *Fry v. Hill*, 7 Taunt. R. 397; *Owenson v. Morse*, 7 T. R. 64.

³ *Kearslake v. Morgan*, 5 T. R. 513; *Champion v. Terry*, 3 Ball & Beat, 295; *Thomas v. Heathorn*, 2 Barn. & Cres. 477; *S. C.* 3 Dowl. & Ryl. 647; *Hansard v. Robinson*, 7 Barn. & Cres. 90; *Hoskins v. Duprey*, 9 East, R. 498; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Dutton v. Solomonson*, 3 Bos. & Pul. 582. Post, § 447; Ante, § 434.

⁴ *Champion v. Terry*, 3 Ball & Beat. 295; *Hansard v. Robinson*, 7 Barn. & Cres. 90.

⁵ *Roll v. Wilson*, 12 Moore, R. 510; *S. C.* 4 Bing. R. 273; *Long v. Bailee*, 2 Camp. R. 214.

dee to pay it, recover the amount thereof, together with interest from the time when it was payable.¹ If the vendor be induced to take the promissory note of a third person, as payment, through a fraudulent representation by the vendee of the solvency of such person, the note may be treated as void, and an action for goods sold and delivered be brought to recover the sum therein stated as the price.²

§ 444. If, by the terms of the contract, the goods be to be paid for by a bill of exchange, or promissory note, and the vendee refuse to give either ; or if the drawee refuse to accept a bill of exchange, when given, the seller cannot sue directly for the price, so long as the bill or note is not due and dishonored ; but he must bring a special action against the vendee for this breach of contract.³

§ 444 *a*. But where payment and delivery are concurrent acts, if the vendee refuse to pay, according to the terms of the contract, when the offer of the goods is made, the property does not vest in him, and he has no right to retain them, and therefore the vendor may bring an action of replevin against him. Thus, where upon a sale of merchandise for cash to be paid for on delivery, the vendee offered the vendor's servant a note of the vendor's, which had become payable, for nearly the amount, and cash for the residue, and upon the vendor's declining to receive such payment, the vendee refused to surrender the goods, it was held that no title passed, and that the vendor could maintain replevin.⁴ And where goods are sold

¹ *Farr v. Ward*, 3 Mees. & Welsb. 26 ; *Heron v. Granger*, 5 Esp. R. 269.

² *Pierce v. Drake*, 15 Johns. R. 475 ; *Wilson v. Force*, 6 Johns. R. 110.

³ *Mussen v. Price*, 4 East, R. 147 ; *Dutton v. Solomonson*, 3 Bos. & Pul. 502 ; *Eng. Law Mag.* Vol. 6, p. 125 ; *Ferguson v. Carrington*, 9 Barn. & Cres. 59. But see *Hickling v. Hardy*, 1 Moore, R. 61 ; *S. C.* 7 Taunt. R. 312 ; *Eddy v. Stafford*, 18 Vermt. (3 Washb.) R. 235.

⁴ *Levin v. Smith*, 1 Denio, R. 571 ; *Powell v. Bradlee*, 9 Gill & Johns.

to be paid for by a bill or note payable at a future day, and such bill or note is not delivered according to the terms of the sale, the vendor may sue immediately for a breach of the special agreement, and recover as damages the value of the goods, allowing rebate of interest during the stipulated credit.¹ But assumpsit on the common count will not lie, until the credit has expired.² Yet, if the note is to be given at six months, and the goods are delivered and no demand is made for two months after the sale, the condition will be deemed to be waived.³

§ 445. If the goods be to be paid for, partly in money, and partly in goods, and the vendee deliver neither the goods nor the money, the vendor must declare specially on the contract. But if the goods be delivered to him in part-payment, the money may be recovered under the common count for goods sold and delivered.⁴

445 *a*. Where a person acquires property under a contract of sale, by means of false and fraudulent representations in respect to his solvency and means of paying therefor, he acquires no right either of property or of possession; and the vendor may retake the property, using no more force than is necessary for that purpose; and if he be resisted by the vendee, he may still use such force as is necessary;⁵ or the vendor may recover the goods in an action of trover or replevin, unless they have passed to a third person holding them *bonâ fide* for a

R. 220. See, also, *Maxwell v. Briggs*, 17 Verm. R. 176; *Lucy v. Bundy*, 9 N. Hamp. R. 298.

¹ *Hanna v. Mills*, 21 Wend. R. 90. See post, § 979.

² *Ibid*.

³ *Hennequin v. Sands*, 25 Wend. R. 640.

⁴ *Sheldon v. Cox*, 3 Barn. & Cres. R. 420; S. C. 5 Dowl. & Ryl. 277.

⁵ *Hodgenden v. Hubbard*, 18 Verm. (3 Washburn,) R. 504; *Johnson v. Peck*, 1 Woodbury & Minot, (S. C.) R. 334.

valuable consideration, without notice.¹ And where a person makes a fraudulent purchase of goods, and gives his acceptance therefor, and deposits them with a third person, it is not necessary that a tender should first be made in order to enable the seller to retake the goods.²

§ 446. Where goods have been obtained through the fraud or misrepresentation of the vendee, the vendor may either affirm or rescind the sale, and reclaim the goods. If he elect to rescind, he must, as we have seen, do so within a reasonable time, and must take care to do nothing affirmatory of the contract, or his right to rescind will be lost.³ And in such case, he should reclaim the goods by an action of *trover* or *replevin*, treating the whole contract as utterly nullified by the fraud; and he should be careful not to bring his action in *assumpsit*, since, as the foundation of this action is the promise of the vendee, the contract is thereby directly affirmed, and his rights will depend on the contract solely.⁴ And where a third party fraudulently procures a sale to be made to an insolvent or incompetent person, and afterwards becomes possessed of the goods, *indebitatus assumpsit* will lie against him to recover the value of the goods.⁵ The mere fact of the insolvency of the vendee, and his liability to immediate attachment, though

¹ *Johnson v. Peck*, 1 Woodbury & Minot, (S. C.) R. 324; *Hoffman v. Noble*, 6 Metcalf, R. 74. See ante, § 844 c, 844 d.

² *Nellis v. Bradley*, 1 Sandford, (Sup. Ct.) R. 560.

³ Ante, § 420; *Hoffman v. Noble*, 6 Metcalf, R. 71; *Towers v. Barrett*, 1 T. R. 136; *Hinde v. Whitehouse*, 7 East, R. 571; *Brinley v. Tibbets*, 7 Greenl. R. 70.

⁴ *Strutt v. Smith*, 1 Crompt. Mees. & Rose. 312; *Bradbury v. Anderton*, 1 Crompt. Mees. & Rose. 490; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Hogan v. Shee*, 2 Esp. R. 522; *Selway v. Fogg*, 5 Mees. & Welsb. 86.

⁵ *Hill v. Perrott*, 3 Taunt. R. 274; *Smedley v. Gooden*, 3 Maule & Selw. 191; *Bennet v. Francis*, 4 Esp. R. 28; *Abbotts v. Barry*, 2 Brod. & Bing. 309; *Bradbury v. Anderton*, 1 Crompt. Mees. & Rose. 490; *Biddle v. Levy*, 1 Stark. R. 20.

well known to himself, and not disclosed to the vendee, would not, ordinarily, amount to such a fraud as to avoid a sale, and enable the vendor to bring *trover*; although it would, under circumstances of implied trust.¹

§ 446 *a*. But this right of the vendor to reclaim goods of the vendee, in cases of fraud, can be enforced only whilst the goods are in the hands, *first*, of the fraudulent purchaser; or, *secondly*, of some agent, trustee, or other person holding for the use and benefit of the purchaser; or, *thirdly*, of some one who has taken them of the purchaser, with knowledge of the fraud by which they were obtained, or with notice sufficient to put him on reasonable inquiry, including, under this head, a mere volunteer, who has obtained the goods without paying any valuable consideration. It follows, that a purchaser for a valuable consideration, without notice, takes a title from the vendee, which is not defeasible, and will therefore hold the goods.² And the reason of this rule is, that as the original owner has voluntarily parted with the goods, and given his vendee a title which is good until the vendor avoids it, (which he may do or not, as he pleases,) it is through his own act that the vendee is enabled to resell, and a *bonâ fide* purchaser, without knowledge of the circumstances, ought not to suffer.³

¹ *Cross v. Peters*, 1 Greenl. R. 376; *Conyers v. Ennis*, 2 Mason, R. 236; *Lupin v. Maine*, 6 Wend. R. 77; *Rowley v. Bigelow*, 12 Pick. R. 307.

² Per Ch. Justice Shaw, in *Hoffman v. Noble*, 6 Metcalf, R. 74. See, also, cases above cited; post, § 851 *a*; *Lloyd v. Brewster*, 9 Paige, Ch. R. 537; *Rowley v. Bigelow*, 12 Pick. R. 307; *Anderson v. Roberts*, 18 Johns. R. 515; *Neal v. Williams*, 20 Maine, R. 391; *Somes v. Brewer*, 2 Pick. R. 184.

³ *Rowley v. Bigelow*, 12 Pick. R. 307; *Ash v. Putnam*, 1 Hill, R. 306; *Hoffman v. Noble*, 6 Metcalf, R. 68; *George v. Kemble*, 24 Pick. R. 241; *Irving v. Motley*, 7 Bing. R. 543; *Barnes v. Bartlett*, 15 Pick. R. 71; *Pickering v. Busk*, 15 Cox, R. 58; *Fenn v. Harrison*, 3 T. R. 760. Ante, §§ 200, 201, 202.

§ 446 *b*. So, also, if the owner place his property in the hands of another person, under such circumstances, or in such a manner, that the law implies a right and power on the part of that person to make a valid sale, a sale by him will be good, although he be not authorized by the owner to sell. Thus, if a principal hold out an agent as having authority to sell for him, and the agent sell to a *bonâ fide* purchaser, in violation of his private instructions, the sale is binding against the principal.

§ 446 *c*. But if the vendor have acquired possession of the goods *wrongfully*, and without the knowledge, connivance, or assent of the owner, as where he has stolen or found them, or holds them merely as bailee, with no express or implied authority to sell, the original owner may reclaim them from the hands of a subsequent *bonâ fide* purchaser for a valuable consideration.¹ The reason of this rule is, that until the original owner has expressly or impliedly agreed to part with his rights of property, or has done some act which operates to deceive the vendee into a belief that the vendor has a right to sell, the wrongful act of a third party, without the fault of the owner, ought not to divest from him his property.

§ 447. But, in cases of fraud, the vendor is not bound to nullify the sale, and bring *trover* to reclaim the goods; he may, if he choose, bring an action of *assumpsit*, and affirm the sale,² and recover the full value of the goods, or the contract price;

¹ Williams *v.* Merle, 11 Wend. R. 80; Everett *v.* Coffin, 6 Wend. R. 609; Kinder *v.* Shaw, 2 Mass. R. 398; Haretop *v.* Hoare, 1 Wils. R. 8; 2 Strange, R. 1187; Wheelwright *v.* Depeyster, 1 Johns. R. 471; Dame *v.* Baldwin, 8 Mass. R. 519; Towne *v.* Collins, 14 Mass. R. 500; Mowrey *v.* Walsh, 8 Cowen, R. 238; Chison *v.* Woods, Hardin, 531; Heacock *v.* Walker, 1 Tyler, R. 338.

² Allen *v.* Ford, 19 Pick. R. 217; Thayer *v.* Turner, 8 Metcalf, R. 550; Whitney *v.* Allaire, 4 Denio, R. 558.

or he may bring the action on the case for damages.¹ For, if the vendee be guilty of fraud, he cannot take advantage thereof to repudiate his own contract.² But after he has rescinded the contract, he cannot bring an action of assumpsit, since that form of action is founded on the contract. So, also, if he would bring *trover* or *replevin* for the property, he should first rescind the contract. And the fact of fraud by the other party, although it enables him to make a rescission, does not enable him to sustain *trover* and *replevin*, because it does not of itself rescind the contract.³

§ 448. We now come to the remedies of the buyer against the seller. And, in the first place, if there be a total failure by the vendee to perform his contract, the vendor may utterly rescind it, and bring an action of money had and received, if the price be paid, — or a special action for damages to recover the market value of the goods at the time and place, when and where they ought to have been delivered.⁴ If there be a partial failure, the vendee cannot rescind the contract unless the partial failure be in respect to the whole goods, — as, if there be an incumbrance thereon; or unless the contract be an entirety; in which case, the breach of any part is a technical breach of the whole contract.⁵ In cases of partial failure,

¹ *Hawkins v. Appleby*, 2 Sandf. Sup. Ct. R. 421; *Whitney v. Allaire*, 4 Denio, R. 558.

² *Strutt v. Smith*, 1 Crompt. Mees. & Rose. 312; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Bradbury v. Anderton*, 1 Crompt. Mees. & Rose. 490.

³ *Thayer v. Turner*, 8 Metcalf, R. 550; *Prentiss v. Russ*, 4 Shepley, R. 30; *Stinson v. Walker*, 8 Shepley, R. 211; *Strutt v. Smith*, 1 Crompt. Mees. & Rose. 315; *Ferguson v. Carrington*, 9 Barn. & Cres. 59; *Allen v. Ford*, 9 Pick. R. 217; *Whitney v. Allaire*, 4 Denio, R. 558. Post, § 458 *a*.

⁴ Ante, § 203, § 423; *Lines v. Rees*, 1 Jur. R. 593; *Lawrence v. Knowles*, 7 Scott, R. 181; S. C. 5 Bing. N. C. 399.

⁵ Ante, § 423; 2 Kent, Comm. Lect. 39, pp. 469, 470; *Farrer v. Nightingal*, 2 Esp. R. 639; *Graham v. Oliver*, 3 Beav. R. 124; *Waddington v.*

therefore, the proper remedy is, ordinarily, by a special action on the contract for damages; and the damages will be calculated as the market value of the goods, at the time and place of delivery, together with compensation for any incidental injury or expense, immediately occasioned by the breach of contract, or which may be presumed to have been calculated by the parties.¹

§ 448 *a*. If the buyer, on receiving a part of the quantity sold, find they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for his non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuse to return the part² delivered.

§ 419. In the second place, if the seller, after the title is passed to the buyer, will not surrender the goods, upon a compliance with the terms by the buyer, the latter may reclaim the goods by an action of *trover*; ³ or he may bring a special

Oliver, 2 Bos. & Pul. N. R. 61; Walker v. Dixon, 2 Stark. R. 281; Giles v. Edwards, 7 T. R. 181; Bragg v. Cole, 6 Moore, R. 114; Clark v. Baker, 5 Metcalf, R. 461.

¹ Clark v. Baker, 5 Metcalf, R. 452; Fielder v. Starkin, 1 H. Black. R. 17; Patteshall v. Tranter, 3 Adolph. & Ell. 103; Brown on Sales, No. 312, 313, 314; Pothier des Oblig. No. 162, 163; Cont. de Vente, No. 70 to 75; Taylor v. Reed, 4 Paige, R. 561; Miller v. The Mariners Church, 7 Greenl. R. 55; Hopkins v. Lee, 6 Wheat. R. 109; Douglas v. McAllister, 3 Cranch. R. 298; Shepherd v. Hampton, 3 Wheat. R. 200; Greening v. Wilkinson, 1 Car. & Payne, 625; Gainsford v. Carroll, 2 Barn. & Cres. 624; Borradaile v. Brunton, 2 Moore, R. 582; S. C. 8 Taunt. R. 535. See, also, cases cited, post.

² Shields v. Pettee, 2 Sandf. Sup. Ct. R. 262.

³ Woodley v. Brown, 1 Car. & Payne, 593; S. C. 2 Bing. R. 527;

action of *assumpsit* for damages, and recover their market value at the time and place, when and where they were to have been delivered, or at any time previous to the trial;¹ or he may utterly rescind the contract, and bring an action for money had and received to recover back the price paid. So long, however, as any thing remains to be done by the seller, in order to transfer the title, or so long as payment is not made, when, by the terms of the contract, credit is not given, the action of *trover* cannot be sustained.² Therefore the buyer of a chattel, ordered to be made for him cannot maintain *trover* therefor until it be finished and delivered constructively.³ But a tender of payment will be sufficient to entitle the vendee to bring an action of *trover*.⁴ In the action of *trover*, the general measure of damages is the value of the thing at the time of its conversion;⁵ but the jury are not limited thereto, and they may, in their discretion, find, as damages, its value at any subsequent time before trial; or additional damages for expenses.⁶ If the vendee elect to bring a special action for

Pattison v. Robinson, 5 Maule & Selw. 105; Ferguson v. Carrington, 9 Barn. & Cres. 59; S. C. 3 Car. & Payne, 457.

¹ Greening v. Wilkinson, 1 Car. & Payne, 625; Shepherd v. Hampton, 3 Wheat. R. 200; Hopkins v. Lee, 6 Wheat. R. 109; Gainsford v. Carroll, 2 Barn. & Cres. 624; Douglas & Mandeville v. McAllister, 3 Cranch, R. 298; Boorman v. Nash, 9 Barn. & Cres. 145; Day v. Cox, 9 Wend. R. 129; Taylor v. Read, 4 Paige, R. 561; Clark v. Pinney, 7 Cowen, R. 681; Gilpins v. Consequa, 1 Peters, C. C. R. 85.

² Bloxam v. Morley, 7 Dowl. & Ryl. 407; Bloxam v. Sanders, 4 Barn. & Cres. 941; S. C. 7 Dowl. & Ryl. 396; Wilmhurst v. Baker, 5 Bing. N. C. 541; Austen v. Craven, 4 Taunt. R. 644; White v. Wilks, 5 Taunt. R. 156; Mucklow v. Mangles, 1 Taunt. R. 218; Woods v. Russell, 5 Barn. & Ald. 942; S. C. 1 Dowl. & Ryl. 58; Conway v. Bush, 4 Barb. Sup. Ct. R. 565.

³ Mucklow v. Mangles, 1 Taunt. R. 218; Woods v. Russell, 5 Barn. & Ald. 942.

⁴ Martindale v. Smith, 1 Adolph. & Ell. N. S. 389; S. C. 1 Gale & D. 1.

⁵ Finch v. Blount, 7 Car. & Payne, 478.

⁶ Greening v. Wilkinson, 1 Car. & Payne, 625; Davis v. Oswell, 7 Car.

damages, he may, as we have seen, if the price be paid, recover any value, which the goods may have acquired between the time of the sale and the time of the trial of the case.¹ But if the goods have not been paid for, he can only recover, as damages, the difference between the actual price contracted for, — or their market value at the time of the sale, if no price be fixed, — and their market value at the time and place, when and where they should have been delivered.²

§ 450. Again, if, after the property is passed to the vendee, the vendor do not absolutely refuse to deliver the goods, but retain them for an unreasonable length of time, or until the agreed time for delivery has passed, the vendee may, by a special action, recover damages for any injury which may have accrued to him by reason of the delay.³

§ 451. Again, if the contract be an entirety, for a specific quantity, or number or weight of goods, and the vendor only deliver a part, the vendee may refuse to accept, and may rescind the contract, and bring an action for money had and received, — or a special action for damages, and may recover either the actual price paid, in the one case, or in the other

& Payne, 804 ; *Cook v. Hartle*, 8 Car. & Payne, 568 ; *Merlens v. Adcock*, 4 E-p. R. 251 ; *Gainsford v. Carroll*, 2 Barn. & Cres. 621 ; *Boorman v. Nash*, 9 Barn. & Cres. 145.

¹ Ante, § 412, and cases cited. *Clark v. Pinney*, 7 Cowen, R. 82 ; *Sheppard v. Hampton*, 3 Wheat. R. 200 ; *West v. Wentworth*, 3 Cowen, R. 82. In Massachusetts, the value of the goods at the time when delivery ought to be made is considered as the true rule of damages. *Kennedy v. Whitwell*, 4 Pick. R. 466 ; *Sargent v. Franklin Ins. Co.* 8 Pick. R. 90.

² *Sheppard v. Hampton*, 3 Wheat. 200 ; *Clark v. Pinney*, 7 Cowen, R. 681 ; *West v. Wentworth*, 3 Cowen, R. 82 ; *Greening v. Wilkinson*, 1 Car. & Payne, 625.

³ *Greaves v. Ashlin*, 3 Camp. R. 426 ; *Brown on Sales*, § 318 ; *Pothier de Vente*, No. 74 ; *Trait. des Oblig.* No. 169 ; *Domat*, l. 63, § 16, 17, 18 ; *Lawrence v. Knowles*, 7 Scott, R. 381 ; S. C. 5 Bing. N. C. 399.

case, the same damages as if the goods had not been delivered at all.¹ If, however, the vendee actually accept a part, as a part, and not in the course of receiving the whole, he thereby disaffirms the entirety of the contract, and he can only recover, by a special action, a return of a portion of the price equivalent to the value of the part not delivered, together with any special damage which may have resulted from the non-delivery of the whole ; but he cannot rescind the contract wholly, nor bring an action for money had and received.²

§ 452. Where, before the property is passed, the vendor neglects to comply with his agreement, and to deliver the goods bargained for, the remedy of the vendee is by a special action on the contract for damages. Or he may utterly rescind the contract, and sue for the actual price advanced, in an action for money had and received. If the delivery, however, be conditional, — as, if it be on arrival, — it is understood that the liability of the vendor to deliver depends upon the condition, and the vendee cannot, ordinarily, bring an action against him for the goods, or for damages, unless there be a special and peculiar contract involving such a right.³ It will be a good defence to an action for non-delivery, that the vendee is unable to pay for the goods, and has compounded with his creditors.⁴

§ 453. Where the terms of a contract are in the alternative, — as if, in the sale of 100 bags of wheat, the agreement be to deliver forty or fifty bags at a certain day, and the remainder

¹ *Waddington v. Oliver*, 2 Bos. & Pul. N. R. 61 ; *Walker v. Dixon*, 2 Stark. R. 281 ; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386 ; *Mavor v. Pyne*, 3 Bing. R. 285 ; S. C. 2 Moore, R. 2 ; *Shipton v. Casson*, 5 Barn. & Cres. 378 ; *Bragg v. Cole*, 6 Moore, R. 114 ; *Wethers v. Reynolds*, 2 Barn. & Adolph. 882 ; *Holderness v. Shackells*, 8 Barn. & Cres. 618.

² *Ibid.*

³ *Idle v. Thornton*, 3 Camp. R. 274. Ante, § 252.

⁴ *Reader v. Knatchbull*, 5 T. R. 218, n

on the next market day, — the vendee cannot declare upon it as upon an absolute contract, but it must be stated in the alternative.¹ And if a time and place for delivery be appointed, in an action for non-delivery, it is sufficient for the plaintiff to aver that he was ready and willing at such time and place to receive and pay for the goods, without alleging an actual tender of price and refusal.²

§ 453 *a*. Where the time for the delivery of articles contracted to be sold is not fixed, a demand would be necessary before suit therefor.³ But a demand is not required where it would be useless, — as, where the vendor has disabled himself from complying with the contract, — or where a waiver of demand may be inferred from his declarations and conduct.⁴ So, also, where the time for delivery is fixed, and has passed by, no demand need be made.

§ 454. In the next place, as to the remedy of the vendee, upon failure of the vendor to comply with his warranty. The ordinary remedy of the buyer in such cases where the price is paid, and the article accepted and received into possession, is by a special action upon the warranty for damages, by which he may recover the difference between the price actually paid and the actual worth of the article at the place and time of delivery, with all its defects and vices.⁵ So, also, if he sustain

¹ *Penny v. Porter*, 2 East, R. 2; *Shipman v. Saunders*, 2 East, R. 4, n.

² *Rawson v. Johnson*, 1 East, R. 203; *Waterhouse v. Skinner*, 2 Bos. & Pull. 417. Ante, § 412. *Clark v. Crandall*, 3 Barb. Sup. Ct. R. 612.

³ *Cook v. Final*, 13 Wend. R. 285; *Clark v. Crandall*, 3 Barb. Sup. Ct. R. 612.

⁴ *Clark v. Crandall*, 3 Barb. Sup. Ct. R. 612.

⁵ *Caswell v. Coare*, 1 Taunt. R. 566; *Fielder v. Starkin*, 1 H. Black. R. 17; *Lewis v. Peake*, 7 Taunt. R. 153; *Gompertz v. Denton*, 1 Car. & Payne, 267; *Page v. Pavey*, 8 Car. & Payne, 769; *Payne v. Whale*, 7 East, R. 274; *Clare v. Maynard*, 1 Nev. & P. 701; *S. C. 6 Adolph. & Ell. 519*; 7 Car. & Payne, 741; *Stiles v. White*, 11 Metcalf. R. 356.

other additional injury, which is either the immediate consequence of the failure of the vendor to perform his contract or a natural incident thereto, he may recover damages therefor.¹ Thus, where an anchor was lost, in consequence of the insufficiency of a cable which had been bought under a warranty, the vendor was allowed to recover, as a portion of his damages, the value of the anchor.² So, also, where a horse was sold,

¹ *Wrightup v. Chamberlain*, 7 Scott, R. 598; *Green v. Greenbank*, 2 Marsh. R. 485; *Ellis v. Chinnock*, 7 Car. & Payne, 169; *Pennell v. Woodburn*, 7 Car. & Payne, 117; *Borradaile v. Brunton*, 2 Moore, R. 582; *Lewis v. Peake*, 7 Taunt. R. 153; S. C. 2 Marsh. R. 431; *Page v. Pavay*, 8 Car. & Payne, 769.

² *Borradaile v. Brunton*, 2 Moore, R. 582. The same rule also obtains in the Civil Law of France. The rule is thus stated by Pothier, in his *Treatise on Sale*, No. 73, 74: "The action *ex emptio* is not ordinarily extended, as has already been remarked, beyond the damages which the buyer sustains, in relation to the thing itself; for it is these only which are foreseen, and to which the seller expects to subject himself; and, therefore, this action does not ordinarily extend to the damages which the buyer sustains otherwise, *extrinsecus*, and of which the non-performance of the contract is only a remote cause. This is the doctrine of Paul: *Quum per venditorem steterit, quominus rem tradat, omnis utilitas emptoris in æstimationem venit, quæ modo circa ipsam rem consistit*; D. 19, 1, 21, § 3. For example, if one sells oats to a husbandman, and neglects to deliver them according to his contract, the damage, which the non-delivery occasions the buyer in his horses, which, not being properly fed, grow thin, and in his lands, which he is unable to cultivate on account of the weakness of his horses, cannot be claimed against the seller; since it is not a damage suffered by the buyer, *circa ipsam rem venditam*, and the want of delivery is only an occasional or remote cause of it. The law above cited contains some similar examples. The action *ex emptio* is sometimes extended, however, to the damages which the buyer suffers *extrinsecus*, and in his other goods; and this takes place, whenever it appears from circumstances, that such damages were foreseen at the time of the contract, and were agreed to by the seller, at least, impliedly, in case of the non-performance of his engagement. The following is an example of this kind. A carpenter, who is informed that my house is in imminent danger of falling, sells me some props, and agrees to deliver and put them up, in the course of the day, to prevent the accident. If he, through negligence, fails to deliver the props within the time, and, for want

with warranty, and the buyer, relying thereon, afterwards resold him with a similar warranty to a third person, who brought an action thereon against him and recovered costs, amounting to £88, besides the price of the horse, it was held, that he could recover such costs against the first seller, as damages.¹ So, also, if the warranty be broken, and the buyer be obliged to keep the thing sold, and be thereby put to expense, he may recover therefor for such length of time as would be reasonably sufficient to enable him to resell, provided he give notice of its insufficiency.² If no notice be given, the measure of damages will be the difference between the price given and the actual value at the time of the sale, — and storage and expenses of keeping cannot be charged.³ The reasonableness of the time is a matter to be determined by the jury.⁴ So, also, if the vendee of warranted goods before discovering their defect or unsoundness, resell them under a similar warranty and is sued thereon, he may recover of the original vendor the costs of such suit as a part of the damages actually sustained by him, in

of them, the house falls and is demolished on the next day, the carpenter is liable for the loss ; for, though the damage does not concern the thing itself, yet it is one which was foreseen at the time of the contract, and to which the seller tacitly submitted, in case of non-performance of his engagement ; since he was informed of the danger which threatened the house, and to avoid which was the principal object of the contract ; and it was for that purpose that he contracted to deliver and put up the props at the appointed time.”

¹ *Lewis v. Peake*, 7 Taunt. R. 153 ; S. C. 2 Marsh. R. 431. See, also, *Woodward v. Thatcher*, 21 Vermt. (6 Washburn,) 580.

² *Chesterman v. Lamb*, 4 Nev. & Man. 195 ; S. C. 2 Adolph. & Ell. 129 ; *Ellis v. Chinnock*, 7 Car. & Payne, 169 ; *M'Kenzie v. Hancock*, Ry. & Mood. 436 ; *Caswell v. Coare*, 1 Taunt. R. 566 ; S. C. 2 Camp. R. 82 ; *Germaine v. Burton*, 3 Stark. R. 32 ; *Armstrong v. Percy*, 5 Wend. R. 539 ; *Egleston v. Macaulay*, 1 McCord, R. 379 ; *Buchanan v. Parnshaw*, 2 T. R. 745.

³ *Ibid.*

⁴ *Ibid.* ; *Chesterman v. Lamb*, 4 Nev. & Man. 195 ; S. C. 2 Adolph. & Ell. 129.

consequence of the original breach of warranty.¹ He should, however, in such a case, give reasonable notice of the suit to the original vendor.²

§ 454 *a*. Damages cannot, however, be recovered for injuries and losses, which are only the remote results of the failure of warranty, nor for merely speculative injuries.³ Thus, in an executory contract of sale to supply an article for a particular use, if the article be not fit for such use, the buyer is entitled to indemnity for the loss which the non-performance of the contract has occasioned him, and for the immediate and direct gain of which it has deprived him; but it does not entitle him to claim incidental and speculative profits, which possibly might have been made.⁴

¹ *Lewis v. Peake*, 7 Taunt. R. 153; *Armstrong v. Percy*, 5 Wend. R. 535.

² *Ibid*.

³ *Davis v. Fish*, 1 Greene, R. 406. But see *Dunlop v. Higgins*, 1 Clarke & Fennelly (N. S.) 381. Ante, § 412.

⁴ *Freeman v. Clute*, 3 Barbour, Sup. Ct. R. 424. In this case, there was a contract for a steam engine with a suitable boiler, which, when they were put up, proved to be so defective as not to accomplish the end for which they were designed, and three months was occupied in endeavoring to make them useful, but without success. In delivering the judgment of the court, Mr. Justice Harris said: "I agree with the counsel for the plaintiff in the general rule for which he contends, that the party complaining of a breach of an executory contract is entitled to indemnity for the loss which the non-performance of the obligation by the other party has occasioned him, and for the gain of which it has deprived him. But the gain contemplated by this rule is only that which is the direct and immediate fruit of the contract. Such gain may as properly be regarded, in estimating the damages resulting from a failure to perform a contract, as any actual loss the party may sustain. But even the civil law rule, which is more liberal than the common law in the measure of damages for the violation of an executory contract, confines the allowance for the loss of profits to 'the particular thing which is the object of the contract,' and does not embrace such loss of profits as may have been incidentally occasioned in respect to his other affairs. I cannot agree with the counsel for the plaintiff, that the estimated profits upon the manu-

§ 455. Again, whenever the property has passed to the vendee, and the price been paid, but the warranty proves to be broken, the vendee should give notice that the goods are

facture of a specified quantity of flaxseed into linseed oil, constitutes a legitimate item of damages against the defendants. Such profits are entirely too speculative and uncertain to make them a measure of damages. 'It is a very easy matter,' says Chief Justice Nelson, in *Masterton v. The Mayor of Brooklyn*, 7 Hill, 73, 'to figure out large profits upon paper; but it will be found that these, in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance.' There are few who have been so fortunate in their enterprises as not to have learned how great is the difference between speculative estimates of profits and the actual test of experience. Certainly such profits rest too much in speculation to make the loss of the chance of acquiring them the proper subject of consequential damages upon the breach of a contract, unless expressly stipulated for in the contract itself.

"The view that I have taken of this question seems fully sustained by adjudged cases, both in this country and in England. The case of *Blanchard v. Ely*, 21 Wend. 312, bears, in most of its features, a nearer resemblance to this case than any other I have found. There the plaintiff had contracted to build for the defendants a steamboat, *intended to ply on the Susquehanna River* from Owego to Wilkesbarre, and to have the boat completed and put in operation by a certain day; for which he was to receive a stipulated price. The plaintiff, having delivered the boat, brought an action for the price; and, by way of recoupment of damages, the defendants proved that some of the machinery of the boat was defective, in consequence of which they had incurred expenses in making repairs and improvements; that the boat had also been subjected to delays and loss of profits, which amounted to \$100 each trip. The circuit judge allowed the jury to deduct the amount expended by the defendants *in remedying the defects* in the machinery, and in towing the boat to a proper place to have the repairs made, but directed them not to allow for delays or profits which might have been made upon the trips lost. The Supreme Court sustained the charge of the judge. Although the case under consideration may be, and I think is, distinguishable from that just cited, in respect to the question of delays, I cannot see how it can be distinguished with respect to the profits which might have been made but for loss of trips.

"In *Driggs v. Dwight*, 17 Wend. 71, it was held, that a party who had entered into a contract with another for a loan of a tavern stand, and who had, in pursuance of such agreement, broken up his former residence and

unsatisfactory and offer to return them.¹ If the vendor receive them unconditionally, the vendee may then bring an action of money had and received to recover the price, because the contract is thereby impliedly rescinded by mutual consent. But if the vendor refuse to receive them, the vendee must bring a special action on the contract for damages; and he cannot

removed to the place where he was to occupy the tavern stand, might, in an action to recover damages for a breach of the contract, in not giving him a lease of the tavern, recover the expenses he had thus incurred. And the court also say that 'the measure of damages certainly is not confined to the difference of rent, *but that the jury might look to the actual value of the bargain the plaintiff had made.*' The principle of this case, I think, would justify an allowance to the plaintiff of any expenses he had actually incurred in his business *as a consequence* of the failure of the defendants to perform their contract. The case of *Miller v. The Mariners' Church*, 7 Greenl. 51, is to the same effect. The plaintiff had contracted to deliver stone for the defendant's house by a certain time. He failed to deliver by the time specified; but having delivered the stone afterwards, in an action for the price of the stone, the defendants were allowed to recoup in damages the expenses they had *necessarily* incurred by the delay of their workmen for want of the stone.

"The conclusion at which I have arrived, after a careful examination of the facts in this case, and the authorities bearing upon the questions involved, and the principles governing the rule of damages in similar cases, is, that the plaintiff is entitled to recover, in addition to the sum paid by him on account of the machinery, which now amounts, with interest, to about the sum of \$700, the further sum of \$700 for the expenses incurred and the damages sustained by him in consequence of the failure of the defendants to finish the machinery according to their contract. The amount thus allowed embraces the loss of the use of the plaintiff's mill and other machinery, the fuel consumed, the delay of his workmen employed for the purpose of carrying on his business, and the interest on the amount expended in purchasing stock for the mill. I state thus particularly the grounds of my estimate of damages, to enable the parties, if dissatisfied, the better to review the report." *Bridge v. Wain*, 1 Stark. R. 504; *Lewis v. Peake*, 7 Taunt. R. 153; *Armstrong v. Percy*, 5 Wend. R. 535.

¹ In South Carolina, it has been held, that an action may be brought for a breach of warranty, without a tender or return of the article purchased. *Parker v. Pringle*, 2 Strobbart, R. 242.

maintain an action for money had and received unless there had been a condition in the contract authorizing him to return the goods,¹ or unless there be elements of fraud in the contract, which would entitle the vendee to rescind the contract, — such as a knowledge by the vendor of the unsoundness or inferiority of the article warranted, — in which case the buyer may treat the contract as if it never had existed.²

§ 455 *a*. In such cases, the vendee may also, if he so elect, retain the goods, and set up the breach of warranty as a complete defence to an action for the price, if the goods prove to be utterly worthless, — or, in reduction thereof, if the goods be only of inferior quality.³ It is the duty, however, of the buyer in all such cases, to give notice of their inferiority within reasonable time; since, if he do not, a presumption is thereby created, that the goods are such as they were warranted to be, and are satisfactory.⁴ But this is only a presumption which he is at liberty to rebut by proof of the contrary.⁵ If he undertake to use them, or to exercise rights of ownership over them, he is, in all cases, liable for their worth, and only for their

¹ Post, § 456.

² *Thornton v. Wynn*, 12 Wheat. R. 192; *Towers v. Barrett*, 1 T. R. 136; *Voorhees v. Earl*, 2 Hill, R. 288; *Kase v. John*, 10 Watts, R. 107; *West v. Cutting*, 19 Vermt. (4 Washb.) R. 536; *Freeman v. Clute*, 3 Barbour, Sup. Ct. R. 425; *Lewis v. Cosgrave*, 2 Taunt. R. 2; *Abbotts v. Barry*, 5 Moore, R. 98; S. C. 2 Ball & Beat. 369; *Holbrook v. Burt*, 23 Pick. R. 283; *Thurston v. Blanchard*, 22 Pick. R. 18; Ante, § 420; *Street v. Blay*, 2 Barn. & Adolph. 462; *Camp v. Pulver*, 5 Barb. Sup. Ct. 91.

³ *Poulton v. Lattimore*, 9 Barn. & Cres. 259; *Conner v. Henderson*, 15 Mass. R. 322; *Perley v. Balch*, 23 Pick. R. 283; Ante, § 408; *Towers v. Barrett*, 1 T. R. 133; *Street v. Blay*, 2 Barn. & Adolph. 456.

⁴ *Prosser v. Hooper*, 1 Moore, R. 106; *Milner v. Tucker*, 7 Car. & Payne, 15; *Grimaldi v. White*, 4 Esp. R. 95; Ante, § 405; *Fielder v. Starkin*, 1 H. Black. 17.

⁵ *Fielder v. Starkin*, 1 H. Black. R. 17; *Patteshall v. Tranter*, 3 Adolph. & Ell. 103; *Dorr v. Fisher*, 12 Metcalf, R. 274; *Waring v. Mason*, 18 Wend. R. 425.

worth, if the warranty be broken.¹ As, however, the rule is, that wherever an article is sold under a warranty as to its quality, or with a representation amounting to a warranty, the burden of proof in an action to recover the price, is on the vendee, to show that it was not equal to the warranty,² it behoves the vendee to be careful to give notice of the insufficiency of the goods as soon as he discovers it.

§ 456. If, by the special terms of the contract the vendee be authorized to return the goods, in case they do not prove to be satisfactory, — or, if they be sold “on trial,” or “on sale and return,” or “on approval,”³ — the vendee may, if they do not correspond to the warranty, return the goods within a reasonable time, rescind the contract, and bring an action for money had and received, to recover the price, if it be paid by him.⁴ And in all such cases the vendee may retain the goods for a sufficient length of time to make a fair trial.⁵ So, also, on a sale by sample, in which there is an implied privilege of return, where the goods do not correspond to the sample; or where goods, ordered on an executory contract to be manufactured or supplied for a particular purpose, do not agree with the order,

¹ *Towers v. Barrett*, 1 T. R. 133; *Hunt v. Silk*, 5 East, R. 449; *Fisher v. Samuda*, 1 Camp. R. 190; *Street v. Blay*, 2 Barn. & Adolph. 464; *Parker v. Palmer*, 4 Barn. & Ald. 387; *Thurston v. Blanchard*, 22 Pick. R. 20; *Sands v. Taylor*, 5 Johns. R. 395; *Percival v. Blake*, 2 Car. & Payne, 514; *Hopkins v. Appleby*, 1 Stark. R. 477. Ante, § 405.

² *Door v. Fisher*, 1 Cushing, R. 274.

³ Ante, § 250.

⁴ *Towers v. Barrett*, 1 T. R. 136; *Thornton v. Wynn*, 12 Wheat. R. 192; *Coolidge v. Brigham*, 1 Metcalf, R. 550; *Street v. Blay*, 2 Barn. & Adolph. 462. Ante, § 417; *Poulton v. Latimore*, 9 Barn. & Cres. 259; *Adam v. Richards*, 2 H. Black. R. 573; *Freeman v. Clute*, 3 Barbour, Sup. Ct. R. 425; *Sias v. Bates*, 18 Vermt. (3 Washb.) R. 579.

⁵ *Poulton v. Latimore*, 9 Barn. & Cres. 259; *Adam v. Richards*, 2 H. Black. R. 573; *Freeman v. Clute*, 3 Barbour, (Sup. Ct.) R. 425; Ante, § 405; *Sias v. Bates*, 18 Vermt. (3 Washb.) 579.

and are not fit for the purpose, the contract may be rescinded by the vendee, and the action of money had and received may be sustained.¹ But this form of action can only be brought upon a contract, which is rescinded and completely closed,²—and, so long as it remains open and unrescinded, the vendee must declare specially on the warranty. Unless, therefore, the vendee have a right, by the terms of the agreement, to return the goods; or unless they be received when returned, although there be no such agreement; or unless in cases of fraud, or of sale by sample, or of an executory contract, where the warranty is broken and the goods are not actually accepted,—the vendee must bring his action upon the special contract for breach of warranty.³

§ 456 *a*. Wherever the vendee is, by the special terms of the contract, authorized to return the goods, his offer to return, if made within a reasonable time, will be considered as equivalent to an actual return, and sufficient to found the action for money had and received.⁴

§ 457. If, however, the vendor refuse utterly to receive the goods back, upon failure of the warranty, the vendee is under no obligation to keep them for him, but he may, after giving due notice of his intention, proceed to resell them, and recover the difference between the net proceeds and the price paid.⁵ And

¹ *Street v. Blay*, 2 Barn. & Adolph. 462; *Okell v. Smith*, 1 Stark. N. P. C. 107; *Smith v. Field*, 5 T. R. 402; *Adams v. Richards*, 2 H. Black. R. 53. Ante, § 418.

² *Clark v. Baker*, 5 Metcalf, R. 452.

³ *Thornton v. Wynn*, 12 Wheat. R. 192; *Street v. Blay*, 2 Barn. & Adolph. 462; *West v. Cutting*, 19 Vermt. (4 Washburn,) R. 536.

⁴ *Towers v. Barrett*, 1 T. R. 136; *Thornton v. Wynn*, 12 Wheat. R. 192; *Coolidge v. Brigham*, 1 Metcalf, R. 550; *Clark v. Baker*, 5 Metcalf, R. 452.

⁵ Long on Sales, (Rand's ed.) p. 478; *Boulton v. Arnott*, 3 Tyrw. R.

in case of such a resale, if the price had not been paid, the vendor could only recover the proceeds of the sale, after deducting a fair compensation for the services of the vendee. So, also, in case of the absolute refusal of the vendor to receive back the goods, there being no special difficulty or expense in the way, the vendee would not be obliged to resell them, but might set them aside, and give notice that he will not keep them, in which case he would not be liable, except on some special contract duly proved.¹ So, also, if the goods be sent from a distance,—or cannot be returned without great expense,—or are perishable in their nature, and cannot be returned without injury, the vendee, after giving notice to the vendor, may resell them at auction, and recover the difference between the contract price and the net sales; or, if no price be paid, he will be liable only for such net proceeds.² Where a sale is made in such a case, it is not necessary that it should be by auction or in any other fixed mode unless such be the usage; but the goods must be sold in good faith and in the mode best calculated to produce their value; and if there be any usage as to the mode of sale, it should be followed.³ In respect to the notice required in such cases, the rule is that reasonable notice should be given. What constitutes reasonable notice depends on the circumstances of each particular case.⁴

§ 457 *a*. Where the sale is *conditional* upon the performance of some future act by the vendee, and possession of the pro-

267; S. C. 1 Crompt. & Mees. 333; Langfort v. Tiler, 1 Salk. R. 112; Maclean v. Dunn, 4 Bing. R. 723; Boorman v. Nash, 9 Barn. & Cres. 145; Gregory v. McDowel, 8 Wend. R. 435; Day v. Cox, 9 Wend. R. 129; Woodward v. Thatcher, 21 Vermt. (6 Washburn,) R. 580.

¹ Greene v. Bateman, 2 Woodbury & Minot, 359.

² Ibid.

³ Crooks v. Moore, 1 Sand. Sup. Ct. R. 297.

⁴ Ibid.

perty is transferred, the vendor may, upon the failure of the vendee to perform the condition, rescind the contract, and maintain *trover* or *replevin* for the goods; but he cannot maintain *trover* until he has a right to demand possession, and until he has actually made a demand and rescinded the contract.¹ During the intermediate time between the delivery of the property and the performance of the condition, and while the property remains in the hands of the vendee, it may be attached *in invitum* for the debts of the vendee, although he could not *ex suo proprio motu* sell it.²

§ 458. Where, however, the contract is broken as to the identity of the article, it being completely different from what was ordered, and there is no fraud, the seller would be entitled to rescind the contract, on the ground, that there was a mutual mistake, and that there was no contract between the parties in respect to the article actually furnished.³ Of course, if there were fraud, the vendor could rescind; for fraud renders every contract voidable, at the option of the party defrauded. In case of fraud on the part of the vendor, he will be liable not merely for the difference between the price and the value of the thing sold, — or between the value of the thing sold, with its defects, and the value of such a thing as was bargained for; but for the full measure of damage, which the vendee may suffer.⁴

§ 458 *a*. Where the vendee has been fraudulently deceived

¹ *Fairbank v. Phelps*, 22 Pick. R. 536; *Ayer v. Bartlett*, 9 Pick. R. 56; *Smith v. Plower*, 15 East, R. 607; *Gordon v. Harper*, 7 T. R. 9; *Wheeler v. Train*, 3 Pick. R. 258.

² *Ibid.* *Ayer v. Bartlett*, 9 Pick. R. 56.

³ See *Ante*, § 148, 377.

⁴ *Jeffrey v. Bigelow*, 13 Wend. R. 518; *Dimmick v. Lockwood*, 10 Wend. 142; *Walker v. Moore*, 10 Barn. & Cres. 421; *Fox v. Mackreth*, 2 Cox, R. 322; *Pothier de Oblig.* P. 1, ch. 2, sec. 2, No. 166; *Long*, on Sales, (Rand's ed.) p. 479, 480; *Clunnez v. Pezzy*, 1 Camp. R. 8.

by the vendor, he has the same general rights as those which we have already considered as belonging to the vendor in cases where the vendee has been guilty of fraud.¹ He may affirm the contract and sue for damages, or he may rescind it utterly.² So, also, if, after his affirmance of the contract, the other party bring an action against him on the contract, he may *recoup* the damages sustained by him on account of the fraud.³ But after he has affirmed the contract, he cannot maintain an action depending upon the rescission of the contract, such as trover or replevin

§ 458 *b*: In order to support an action for money had and received, the contract must have been previously rescinded *in toto*,⁵ which may be done either by an act of the vendee, where, by the terms of the contract, it is in his power to rescind it by such act; or, by the unconditional assent of the vendor to the rescinding thereof. Where the vendee is at liberty to return the goods bought, by the special terms of the contract, his offer to return will be considered as equivalent to an actual return, and sufficient to found the action for money had and received.⁶

¹ See Ante, §§ 446, 446 *a*, 446 *b*, 446 *c*, 446 *d*, 447, 456.

² Bradley *v.* Bosley, 1 Barb. Ch. R. 125.

³ Whitney *v.* Allaire, 4 Denio, R. 555.

⁴ Ibid. Ante, § 446 et seq.

⁵ Clark *v.* Baker, 5 Metcalf, R. 452.

⁶ Towers *v.* Barrett, 1 T. R. 136; Thornton *v.* Wynn, 12 Wheat. 192; Coolidge *v.* Brigham, 1 Metcalf, 550; Clark *v.* Baker, 5 Metcalf, R. 452.

CHAPTER XVI.

SALES BY AUCTION.

§ 459. HAVING now followed the contract of sale through its different stages from its inception to its completion, and considered, also, the rights and remedies of both parties, in case of a breach of contract, we now propose to consider some particular species of sales, which are governed by peculiar rules, not usually applicable to the common contract of sale. The present chapter will be devoted to the consideration of the rules applicable to sales by auction.

§ 460. A sale by auction is a public sale, where goods are offered to be taken by the highest bidder. There was a contract in the Roman Law, called *In diem addictio*, which closely resembles the sales by auction in the Common Law. This was a contract, by which the vendor bound himself to a sale of a thing for a stipulated price, unless, within a certain stated time, a better price should be offered. "*Ille fundus centum esto tibi emptus, nisi si quis intra kalendas Januarias proximas meliorem conditionem fecerit, quo res a domino abeat.*" Whether this was a sale with a resolutive or subsequent condition, or with a suspensive or precedent condition, was a matter of discussion among the Roman Jurisconsults; and this nice distinction was made, — that, if the terms of the sale were, that a better offer being made, the contract should be abandoned, "*ut meliore allata conditione, discedatur,*" the sale was upon a condition subsequent or resolutive; but if the terms

were, that the sale should be effected *unless* a better offer should be made, "*ut perficiatur emptio, nisi melior conditio offeratur*," it was considered to be a sale upon a condition precedent or suspensive, that is, merely an agreement to sell upon a certain condition.¹ The latter sale corresponds very closely to sales by auction.

§ 461. In a sale by auction the seller may withdraw the goods, or the bidder may retract his bid, at any time before they are knocked off; for so long as the final consent of both parties is not signified by the blow of the hammer, there are only mutual propositions, but no mutual agreement to one definite proposition.² Any retraction by either party should, however, be made so loud as to be heard by the other.³ But as soon as the hammer is struck down, which is the typical notification by the seller that the offer of the buyer is accepted, the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid, nor the buyer afterwards to withdraw from the contract.⁴ The buyer may, however, when the hammer is struck down and the terms of sale proclaimed, refuse on the spot to be bound by the sale, if they be contrary to his understanding of them. But if he remain silent, his assent is necessarily implied.

§ 462. If either party be guilty of fraud, or of deceitful misrepresentation, whereby the bidders are misled; or of a mistake as to a material and essential particular, the sale is thereby rendered voidable, so that either can, at any time, retract.⁵

¹ Dig. Lib. 18, tit. 2.

² *Payne v. Cave*, 3 T. R. 148; *Routledge v. Grant*, 4 Bing. R. 653; *Cook v. Oxley*, 3 T. R. 654.

³ *Jones v. Nanny*, McLell. 390.

⁴ *Ibid.*

⁵ *Fuller v. Abraham*, 6 Moore, R. 316; *Levi v. Levi*, 6 Car. & Payne, 239; *Norfolk v. Worthy*, 1 Camp. R. 340.

Thus, where the plaintiff, on the sale of a barge, addressed the company present, complaining of ill-usage from the owner, and asserted that the owner had a claim against him, by which the company were prevented from bidding, and the barge was knocked off to the plaintiff; it was held, that, under the circumstances, he could not insist upon the sale.¹ Again, if there be a mistake of a material and essential character, — as, if the property prove to have no existence, or cannot be found, — or any such mistake as that, without it, the party would never have entered into the contract at all, the purchaser may rescind the contract altogether, and is not bound to accept the article and sue for damages.² Nor does it make any difference, that the sale was made under a stipulation that error or misstatement should not vitiate the sale if the misdescription be wilfully or fraudulently made with a design to mislead, and operate to enhance the value of the subject-matter.³ Indeed, it has been held, — and this seems to be the justest and truest doctrine, — that if, under such a condition, there be a mistake as to a material part forming the main or an essential inducement to the sale, the contract may be avoided by the buyer, although there were no fraud.⁴

§ 463. Where there are printed conditions of sale, if they be

¹ *Fuller v. Abraham*, 6 Moore, R. 316.

² *Norfolk v. Worthy*, 1 Camp. R. 340; *Robinson v. Musgrove*, 8 Car. & Payne, 469; S. C. 2 Mood. & Rob. 92; *Flight v. Booth*, 1 Bing. N. C. 377; *Hammond v. Allen*, 2 Sumner, R. 387; *Daniel v. Mitchell*, 1 Story, R. 172; *Sherwood v. Robins*, 3 Car. & Payne, 339; S. C. Mood. & Malk. 194; *Malins v. Freeman*, 2 Keen, R. 25.

³ *Ibid.*; *Robinson v. Musgrove*, 8 Car. & Payne, 469; S. C. 2 Mood. & Rob. 92; *Norfolk v. Worthy*, 1 Camp. R. 337.

⁴ *Flight v. Booth*, 1 Bing. N. C. 377; *Leach v. Mullett*, 3 Car. & Payne, 115; *Sherwood v. Robins*, 3 Car. & Payne, 339; S. C. Mood. & Malk. 194; *Dobell v. Hutchinson*, 3 Adolph. & Ell. 355, 372; *Belworth v. Hassell*, 4 Camp. R. 140; *Sugden on Vend.* 264; *Dykes v. Blake*, 4 Bing. N. C. 463.

brought to the knowledge of the vendee, — as if they be posted upon the auctioneer's box, or in the auction room, and be seen by him, or be specially referred to in the sale itself, — or, indeed, be made known to him in any way, — they will form a part of the terms of the contract, and will be binding upon the parties.¹ As where, at a horse repository, there were printed conditions posted up, setting forth that no warranty of soundness would remain in force beyond twelve o'clock noon of the next day after sale; it was held, that the buyer of a horse was bound thereby, although no special reference was made thereto in the sale itself; inasmuch as he knew of the regulations; and that, as he did not return the horse within the specified time, he could not recover on the warranty.² So, also, where the conditions of a sale by auction were that the goods should be cleared away at the expense of the buyer, in fourteen days, and the price should be paid on or before delivery; and that, if any lots remained uncleared, after the time allowed, the deposit money should be forfeited, the goods resold, and the loss on the resale made good by the purchaser; and the broker gave a bought note, which allowed fourteen days for receiving and delivery; it was held by the Court of Common Pleas, that only the buyer had fourteen days to take away the goods, but that the seller was bound to deliver them immediately.³ The printed conditions under which a sale by auction proceeds, cannot be varied or contradicted by parol evidence of verbal statements, made by the auctioneer at the time of the sale, except for the purpose of proving fraud.⁴

¹ *Mesnard v. Aldridge*, 3 Esp. R. 271; *Bywater v. Richardson*, 1 Adolph. & Ell. 508; *Baglenole v. Walters*, 3 Camp. R. 154; *Eagleton v. East Ind. Co.* 3 Bos. & Pul. 55.

² *Bywater v. Richardson*, 1 Adolph. & Ell. 508.

³ *Hagedorn v. Laing*, 6 Taunt. R. 162.

⁴ *Shelton v. Livius*, 2 Crompt. & Jerv. 411; *Gunnis v. Erhart*, 1 H. Black. R. 289; *Powell v. Edmunds*, 12 East, R. 6; *Slack v. Highgate Archway Co.*, 5 Taunt. R. 792; *Bradshaw v. Bennett*, 5 Car. & Payne, 48.

Where, however, any thing is done by one party, with the permission of the other, in contravention of the conditions of sale, it would seem to amount to a waiver thereof,¹ and of course, if there be any special agreement, varying the conditions, the parties would not be bound by them.² Where, therefore, a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of the goods, and was entered as such by the auctioneer; it was held, that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery.³

§ 464. In respect to what constitutes an entire contract of sale by auction, the same rules apply as to a common contract of sale. If the consideration be entire, and not distinctly susceptible of apportionment by the very terms of the contract, the contract is entire, and not otherwise.⁴ Where, therefore, several lots of goods, or several things are put up as distinct things, and are knocked down to the purchaser for distinct sums, for which his name is marked in the catalogue against each lot or thing, by the auctioneer, there is a distinct contract as to each thing.⁵ But if they all be marked down to him at one sum, or as one lot, the contract is entire.⁶

§ 465. In the next place, as to the operation of the Statute

¹ *Ex parte Gwynne*, 12 Ves. Jr. 379.

² *Bartlett v. Purnell*, 4 Adolph. & Ell. 792.

³ *Bartlett v. Purnell*, 4 Adolph. & Ell. 792.

⁴ *Ante*, § 240 to 246.

⁵ *Roots v. Lord Dormer*, 4 Barn. & Adolph. 77; *Emmerson c. Heelis*, 2 Taunt. R. 38; *Baldey v. Parker*, 2 Barn. & Cres. 44; *James v. Short*, 1 Stark. R. 426.

⁶ *Dykes v. Blake*, 4 Bing. N. C. 463; S. C. 6 Scott, R. 320.

of Frauds upon sales by auction. This statute, in its fourth section, enacts, that "no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person, thereto by him lawfully authorized." And the seventeenth section of the same statute enacts that "no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain or in part-payment; or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorized."¹ Within the terms of both these sections, sales by auction are held to be, on the ground, that although they are made in the presence of many witnesses, yet that such evidence ought not to be admitted merely because its quantity would render perjury less frequent; for an opportunity would be, nevertheless, afforded for an indefiniteness of construction, and an uncertainty of practice, which it was the very object of the statute to prevent.²

§ 466. The requisitions of this statute have already been fully considered,³ and here it is only necessary briefly to reca-

¹ The amount necessary to bring a sale within the provisions of this statute, is fixed in New York at \$50; in Vermont at \$40; in Maine at \$30; in New Hampshire at \$33.33; and in Massachusetts at \$50. In Rhode Island this particular provision has never been adopted.

² *Kenworthy v. Schofield*, 2 Barn. & Cres. 947; *Walker v. Constable*, 1 Bos. & Pul. 306; *Emmerson v. Heelis*, 2 Taunt. R. 38; *White v. Proctor*, 4 Taunt. R. 209; *Hinde v. Whitehouse*, 7 East, R. 558.

³ Ante, Chap. VIII.

pitulate the most important rules. As to the memorandum required by the fourth section, the rule is, that it should distinctly set forth the promise and the consideration, either in itself, or by reference, contained in itself, to something extrinsic, by which they may be made certain ; that it should be signed, at least, by one party, and that the name of the other should appear on it.¹ The exact terms of the consideration need not, however, be stated ; provided it appear distinctly, that there is some consideration.²

§ 467. As to the memorandum required by the seventeenth section, it has been held, that it should contain the full terms of the contract ; that is, the names of the buyer and seller, the subject of sale, the price, and the terms of credit, and the conditions of sale, if there be any.³ A mere signing of the auction catalogue with the prices of the article bought is not, therefore, sufficient, if there be any conditions of sale not stated therein.⁴ It is not necessary, however, that the memorandum should be signed by both parties, provided the name of the party charged be affixed thereto with his consent or by his order.⁵ Again, it is not necessary, that all the terms of

¹ *Kenworthy v. Schofield*, 2 Barn. & Cres. 947 ; *Stapp v. Lill*, 1 Camp. R. 212 ; S. C. 9 East, R. 348 ; *Lyon v. Lamb*, cited *Fell on Merc. Guaranty*, 318 ; *Morris v. Stacey*, Holt, N. P. R. 153 ; *Champion v. Plummer*, 4 Bos. & Pul. 252 ; *Morley v. Boothby*, 3 Bing. R. 107. See Ante, § 270.

² *Ibid* ; *Stapp v. Lill*, 1 Camp. R. 242 ; S. C. 9 East, R. 348.

³ *Champion v. Plummer*, 1 Bos. & Pul. N. R. 154 ; *Kenworthy v. Schofield*, 2 Barn. & Cres. 947 ; *Kain v. Old*, 2 Barn. and Cres. 627 ; *Elmore v. Kingscote*, 5 Barn. & Cres. 583 ; *Saunderson v. Jackson*, 2 Bos. & Pul. 238 ; *Hinde v. Whitehouse*, 7 East, R. 558.

⁴ *Hinde v. Whitehouse*, 7 East, R. 558.

⁵ *Johnson v. Dodgson*, 2 Mees. & Welsb. 653 ; *Schneider v. Morris*, 2 Maule & Selw. 286 ; *Edgerton v. Matthews*, 6 East, R. 307 ; *Laythorpe v. Bryant*, 3 Scott, R. 250 ; *Weightman v. Caldwell*, 4 Wheat. R. 85, and note ; *Penniman v. Hartshorn*, 13 Mass. R. 92 ; *Merritt v. Clason*, 12 Johns. R. 102 ; *Barstow v. Gray*, 3 Greenl. R. 409 ; *Douglass v. Spears*, 2 Nott

the contract should appear upon the same paper ; for if they can be clearly and unmistakeably collected from several papers referring to each other, or from a defective memorandum, coupled with a letter referring thereto, and supplying the deficiency, it will be sufficient to satisfy the requisitions of the statute.¹ But the memorandum, or papers must be sufficiently clear to express the whole contract, without resort to verbal testimony, since, otherwise, the very object of the statute would be frustrated. The only purpose, for which parol evidence in relation to the memorandum is admitted, is as a means of interpretation and explanation, in cases where technical terms are employed.²

§ 468. This memorandum may be made not only by the parties, but by any "agent thereunto lawfully authorized." And in respect to this provision, the rule is in auction sales, that the auctioneer is the agent of both parties, so as to bind them by an entry in his books of the terms of the sale ;³ unless the facts of the particular case indicate, that he is not so intended.⁴ So, also, a clerk of the auctioneer, who attends the sale, and in compliance with the auctioneer's proclamation,

& McCord, 207 ; 2 Kent, Comm. Lect. 39, p. 510, 511 ; *Flight v. Bolland*, 4 Russ. R. 298 ; *Clason v. Bailey*, 14 Johns. R. 487 ; *Proper v. Parker*, 1 Russ. & Mylne, 625. Ante, § 266.

¹ *Saunderson v. Jackson*, 2 Bos. & Pul. 238 ; *Dobell v. Hutchinson*, 3 Adolph. & Ell. 355 ; *Smith v. Surman*, 9 Barn. & Cres. 561 ; *Lent v. Padelford*, 10 Mass. R. 230 ; *Phillimore v. Barry*, 1 Camp. R. 513.

² *Birch v. Depeyster*, 4 Camp. R. 385 ; *Johnston v. Osborne*, 11 Adolph. & Ell. 549 ; *Phill. & Amos on Evid.* 738, 739 (edit. 1838.)

³ *Bird v. Boulter*, 4 Barn. & Adolph. 446, 447. See, also, *S. C.* 1 Nev. & Man. 316, note ; *Wright v. Dannah*, 2 Camp. R. 203 ; *Kenworthy v. Schofield*, 2 Barn. & Cres. 945 ; *Farebrother v. Simmons*, 5 Barn. & Ald. 333 ; *Henderson v. Barnwell*, 1 Younge & Jerv. 389 ; *Cleaves v. Foss*, 4 Greenl. R. 1 ; *Jenkins v. Hogg*, 2 Const. R. 821 ; *Gordon v. Sims*, 2 McCord, R. 164.

⁴ *Bartlett v. Purnell*, 4 Adolph. & Ell. 793, 794.

when he knocks an article down to the seller, makes a memorandum thereof in his books, without objection by the seller, is a sufficient agent within the meaning of the statute.¹ If, however, the auctioneer be the agent, he cannot personally bring an action against the buyer; but the action must be brought in the name of the vendor, for whom he acts.² Yet, if the auctioneer's deputy, or clerk, make the entry or memorandum, following the declaration of the auctioneer at the knocking off of the article, the auctioneer may maintain an action personally.³ That is, the agent must not appear in the action to be one of the parties, but to be a third person.⁴ An entry cannot, however, be made by a clerk, not present at the sale, and not making the memorandum in the presence and with the implied consent of the parties, but entering it afterwards at the request of the auctioneer.⁵

§ 469. In respect to the first exception in the statute, namely, that the buyer shall "accept a part of the goods so sold, and actually receive the same," the rule is, that a final surrender by the seller, and a complete appropriation by the buyer of the whole of the goods, or in the case of an entire contract, of a part of the goods, in process of receiving the whole, are required to satisfy the statute. No such surrender can be final within the meaning of this exception, so long as the seller retains any right of lien, or of stoppage *in transitu*; and no appropriation can be complete so long as the buyer is at liberty to return the goods, in case they do not correspond

¹ Wright *v.* Dannah, 2 Camp. R. 203; Farebrother *v.* Simmons, 5 Barn. & Ald. 333; Henderson *v.* Barnwell, 1 Younge & Jerv. 389.

² Bird *v.* Boulter, 4 Barn. & Adolph. 446, 447.

³ Ibid.

⁴ Ibid.; Farebrother *v.* Simmons, 5 Barn. & Ald. 333; Wright *v.* Dannah, 2 Camp. R. 203; Sewall *v.* Fitch, 8 Cowen, R. 215.

⁵ Henderson *v.* Barnwell, 1 Younge & Jerv. 389; Alna *v.* Plummer, 4 Greenl. R. 258.

to the warranty. The delivery must not only be sufficient to transfer the title, but also to destroy the rights of the vendor over the specific subject-matter, in virtue of the old agreement.¹ And, therefore, a delivery to any person who is a mere middle-man, in whose hand the goods are subject to any control of the vendor, is not sufficient.²

§ 470. The next consideration is as to the rights, duties, and liabilities of the auctioneer. The auctioneer is ordinarily the agent of the vendor and vendee, for the purposes of the sale, and has the ordinary rights and liabilities of a special agent. He has, therefore, a claim for compensation, which is ordinarily in the form of a commission for services, and is determined, in the absence of any special agreement, by the common usage;³ and also a right to claim a reimbursement for all expenses and advances, properly incurred by him in the course of his agency.⁴ He is, also, entitled to compensation

¹ See *Ante*, § 276 to 281; *Rohde v. Thwaites*, 6 Barn. & Cres. 388; *Baldey v. Parker*, 2 Barn. & Cres. 44; *Phillips v. Bistolli*, 2 Barn. & Cres. 513; *Smith v. Surman*, 9 Barn. & Cres. 561; *Carter v. Touissant*, 5 Barn. & Ald. 858; *Kent v. Huskisson*, 3 Bos. & Pul. 233; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Miles v. Gorton*, 2 Crompt. & Mees. 501; *Townley v. Crump*, 5 Nev. & Mann. 608; *Winks v. Hassall*, 9 Barn. & Cres. 375; *Bloxam v. Saunders*, 4 Barn. & Cress. 941.

² *Ashley v. Emery*, 4 Maule & Selw. 264; *Hanson v. Armitage*, 5 Barn. & Ald. 559; *Howe v. Palmer*, 3 Barn. & Ald. 321.

³ *Bower v. Jones*, 8 Bing. R. 65; *Coles v. Trecothick*, 9 Ves. R. 243; *Maltby v. Christie*, 1 Esp. 340; *Eicke v. Meyer*, 3 Camp. R. 412; *Cohen v. Paget*, 4 Camp. R. 96; *Roberts v. Jackson*, 2 Stark. R. 225; *Chapman v. De Tastet*, 2 Stark. R. 294; *Bower v. Jones*, 8 Bing. R. 65; *Robinson v. New York Ins. Co.* 2 Caines, R. 357; *Story on Agency*, § 326 et seq.; *Story on Contracts*, § 321, 322, 323, and cases there cited; *Waldo v. Martin*, 4 Barn. & Cres. 319.

⁴ *Story on Agency*, § 335-339; *Powell v. Trustees of Newburgh*, 19 Johns. R. 284; *Capp v. Popham*, 6 East, R. 392; *Hardacre v. Stewart*, 5 Esp. R. 103; *D'Arcy v. Lyle*, 5 Binney, R. 441; *Rogers v. Kneeland*, 10 Wend. R. 218.

from his principal for damages resulting from the agency, unless he be guilty of improper and unauthorized conduct in relation thereto.¹ But before he can claim compensation, he must have faithfully performed all his duty; unless, by usage, in the particular transaction, a proportional remuneration is allowed for a partial performance.²

§ 471. He is, also, ordinarily, entitled to sue either party, while he has a beneficial interest. He may, therefore, personally, sue his principal for damages, or expenses, or for his commission; or he may, as representative of the seller, sue the buyer for the price of the goods, — even although the goods be sold at the house of the principal, and be known to be his property, — or even if he declare the name of the principal at the sale.³ But if the goods, which he has sold, do not belong to the vendor, and are claimed by the real owner, he cannot maintain an action against the buyer.⁴

§ 472. The *duties* of the auctioneer are, in the first place, to take the same care of the goods, which are sent to him for sale, as if they were his own property. His responsibilities and duties, in this respect, are those of a bailee for Hire of Labor and Services, which bailment is technically called *Locatio operis*. He is bound to exercise only ordinary diligence and skill, and is not responsible for unavoidable accidents.⁵

¹ *Adamson v. Jarvis*, 4 Bing. R. 66; *Allaire v. Orelan*, 2 Johns. Cas. 54; *Coventry v. Barton*, 17 Johns. R. 142; *Hardacre v. Stewart*, 5 Esp. R. 103; *Capp v. Popham*, 6 East, R. 392; *Jones v. Nanney*, 13 Price, R. 76; *Denew v. Daverill*, 3 Camp. R. 451.

² *Hamond v. Holiday*, 1 Car. & Payne, 384; *Broad v. Thomas*, 7 Bing. R. 99; *Dalton v. Irvin*, 4 Car. & Payne, 289; *Reed v. Rann*, 10 Barn. & Cres. 438.

³ *Williams v. Millington*, 1 H. Black. R. 81; *Atkyns v. Amble*, 2 Esp. R. 493.

⁴ *Dickenson v. Naul*, 4 Barn. & Adolph. 638; S. C. 1 Nev. & Man. 721.

⁵ *Maltby v. Christie*, 1 Esp. R. 340; Story on Bailm. § 431.

§ 473. Again, it is his duty strictly to observe all the instructions of his principal, and all the conditions of sale; and if he deviate from them he will be personally liable for the consequences, as well in respect to his liabilities, as to his remedies.¹ Thus, where goods are intrusted to him to sell at auction, he would not be authorized to sell them at private sale.² He would not be bound, however, strictly to obey instructions, which would operate as a fraud upon others. And if no special instructions be given, it is his duty to follow the common custom in the business. If, however, although he disobey his instructions, the principal afterwards, with full knowledge thereof, either expressly, or by implication, assent to his course, such assent will be a ratification thereof, which will entitle him to the same rights as if he had strictly followed his instructions.³

§ 474. So, also, where an auctioneer, after a sale by public auction, receives a deposit therefor from the vendee, it is his duty, as the agent, or rather as the stake-holder of both vendor and vendee, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs.⁴

§ 475. Again, the authority committed to an auctioneer is a personal trust which he cannot delegate to another without the consent of the owner.⁵ He cannot, therefore, authorize his

¹ *Jones v. Nanney*, 13 Price, R. 76; *S. C. McLell. R.* 25; *Bexwell v. Christie*, Cowp. R. 395; *Denew v. Daverell*, 3 Camp. R. 451.

² *Daniel v. Adams*, Amb. R. 495.

³ *Callin v. Bell*, 4 Camp. R. 183; *Smith v. Colagan*, 1 T. R. 189, note; *Forrestier v. Bordman*, 1 Story, R. 43; *Story on Agency*, § 49, and note; § 212, 252; *Veazie v. Williams*, 3 Story, R. 612.

⁴ *Edwards v. Hodding*, 5 Taunt. R. 815; *Gray v. Gutteridge*, 3 Car. & Payne, 43; *Spittle v. Lavender*, 5 Moore, R. 270; *S. C. 2 Brod. & Bing.* 452. See Post, § 478.

⁵ *Coles v. Trecothick*, 9 Ves. R. 243; *Commonwealth v. Harnden*, 19

clerk to act as agent for his employer, in his absence.¹ He is not, however, bound in all cases to become the orator on the occasion; but he may employ another person to use the hammer and make the declamations, provided it be in his presence, and under his immediate direction and supervision.² Nor, in such a case, will his occasional absence for a time during the sale invalidate the sale.³

§ 476. Again, an auctioneer, like every other agent, cannot, ordinarily, purchase the goods of his principal, either on his own account, or in behalf of a third person. And this rule is founded on the clearest principles of justice and of sound policy; since, in such case, the interest of the agent, as agent, would be wholly at variance with his interest as purchaser, and would tend directly to the furtherance of fraud.⁴

§ 477. The *liabilities* of an auctioneer sometimes result from an omission by him to perform his duties; sometimes they are natural incidents thereto, and sometimes they are assumed by him, either from design or negligence. If he fail to comply with his instructions, and with the conditions of sale; or, if he do not employ ordinary diligence in taking care of the goods intrusted to him for sale; or, if he delegate his charge, and injury accrue; or, if he purchase the goods, or do any other improper act; he is liable therefor to the purchaser, and cannot

Pick. R. 482; *Ess v. Truscott*, 2 Mees. & Welsb. 385; *Coombe's case*, 9 Coke, R. 75; *Com. Dig. Attorney, C. 3*; *Lausatt v. Lippincott*, 6 Serg. & Rawle, 386; *Solly v. Rathbone*, 2 Maule & Selw. 298.

¹ *Coles v. Trecothick*, 9 Ves. R. 243.

² *Commonwealth v. Harnden*, 19 Pick. R. 482.

³ *Ibid.*

⁴ *Barker v. Marine Ins. Co.* 2 Mason, R. 369; *Church v. Marine Ins. Co.* 1 Mason, R. 341; *Copeland v. Mercantile Ins. Co.* 6 Pick. R. 204; *Wright v. Dannah*, 2 Camp. R. 203; *Gillett v. Peppercorn*, 3 Beav. R. 78; *Story on Agency*, §§ 13, 108; *Downes v. Gazebrook*, 3 Meriv. R. 200.

recover his commissions.¹ So, also, if he do not disclose the name of his principal at the time of the sale, he assumes the responsibility of the sale, and is answerable in damages to the vendee for any injury which may have resulted from the non-completion of the contract.²

§ 478. Where, in a sale by auction, a deposit of money is made by the vendee in the hands of the auctioneer, we have seen that his duty is to retain it until the sale is complete, and it is ascertained to whom it belongs.³ Until the sale is completed, he is the stake-holder of both parties, and is liable therefor.⁴ If, therefore, he pay it over to the vendor before the contract is completed, although he receive no notice from the vendee not to do so, and although he have acted entirely *bonâ fide*, yet, if the sale be annulled on account of the vendor's defect of title, he will be liable to the vendee for the deposit, in an action for money had and received.⁵ But he is not, in such case, liable for interest thereon, unless the money be demanded, or notice be given, that the contract has been rescinded ;⁶ or, perhaps, unless it be proved that he made interest thereon.⁷ If the auctioneer receive money as a deposit on the sale, knowing that there is a defect in the title, he would, *a fortiori*, be liable therefor, although he had paid it over to the vendor.⁸ But where an action is brought against the

¹ Ante, § 442 to 446, and cases cited. See, also, *Brown v. Staton*, 2 Chitt. R. 353 ; *Nelson v. Aldridge*, 2 Stark. R. 435.

² *Hanson v. Roberdean*, Peake, R. 120 ; *Mills v. Hunt*, 20 Wend. R. 431.

³ Ante, § 444.

⁴ *Edwards v. Hodding*, 5 Taunt. R. 815 ; *Hanson v. Roberdean*, Peake, R. 120 ; *Gray v. Gutteridge*, 3 Car. & Payne, 40 ; *Burrough v. Skinner*, 5 Burr. R. 2639.

⁵ *Gray v. Gutteridge*, 3 Car. & Payne, 40.

⁶ *Gaby v. Driver*, 2 Younge & Jerv. 549 ; *Lee v. Munn*, 1 B. Moore, R. 481 ; *S. C.* 8 Taunt. R. 45 ; *Calton v. Bragg*, 15 East, R. 223.

⁷ *Curling v. Shuttleworth*, 6 Bing. R. 121.

⁸ *Edwards v. Hodding*, 5 Taunt. R. 815.

auctioneer for the deposit, he cannot recover the costs thereof from the principal, in an action for money had and received, but must declare specially.¹

§ 479. Again, if the auctioneer be guilty of negligence, and omit to take proper precautions to secure his commissions, or auction duty, he cannot recover them from the vendor or vendee.² As where the auctioneer sold the goods of A and B together, as the goods of A, and C became the purchaser of some of A's goods, and through negligence in not giving C notice that they belonged to A, C settled with B for the price; it was held, that the auctioneer could not recover the price from the buyer.³ And it was also held, that, in such a case, if the auctioneer bring an action against the buyer for the price of the goods, the buyer might set off a debt due from A to him.⁴

§ 480. So, also, if the auctioneer, in selling the goods, undertake to warrant them to be of a certain quality or species, without disclosing the name of his principal, he will be personally liable thereon, whether he were possessed of authority or not. Although, if he have not exceeded the limits of his authority, he will have an action over against his principal. But if he disclose the name of his principal, and make a warranty within the limits of his authority, he will not be personally liable for breach thereof.⁵

¹ *Spurrier v. Elderton*, 5 Esp. R. 1.

² *Denew v. Daverell*, 3 Camp. R. 451; *Capp v. Topham*, 6 East, R. 392; *Jones v. Nanney*, 13 Price, R. 76; *Hicks v. Minturn*, 19 Johns. R. 550.

³ *Coppin v. Walker*, 7 Taunt. R. 237.

⁴ *Coppin v. Craig*, 7 Taunt. R. 213.

⁵ *Hanson v. Roberdean*, Peake, R. 120; *Fenn v. Harrison*, 3 T. R. 761; *Catlin v. Bell*, 4 Camp. R. 184; *Prince v. Clark*, 1 Barn. & Cres. 186. There seems to be some doubt whether an auctioneer has, in virtue of his office, a right to warrant without special authority. See *The Monte Allegre*,

§ 481. Again, if the auctioneer be guilty of fraud or deceit, or assume the responsibility of selling disputed goods, he will render himself personally liable to the party defrauded. If, therefore, he have notice that the goods, which he is about to sell, do not belong rightfully to his employer,—or, that the title to them is a matter of dispute,—and he, nevertheless, proceed to sell them, he will be personally responsible.¹ But if he be deceived himself, and be ignorant that his employer has not an undisputed title to the goods, although he will, in the first instance, be responsible to the true owner, yet he will have his remedy against his employer.² But in cases where he conspires with the vendor to defraud the buyer, he has no remedy against his confederate for damages recovered against him by the party defrauded.³ As it is the fraud which prevents him from recovering, the rule would not apply to a case where he was employed to act merely for the purpose of trying or asserting a right; or where he was deceived into a belief in the goodness of the vendor's title.⁴

§ 482. In the next place, as to the employment by the vendor of puffers, by-bidders, white bonnets, or decoy ducks, as they are technically called; that is, persons, who, without having any intention to purchase, are employed by the vendor to raise the price by fictitious bids, thereby increasing competition

9 Wheat. R. 645. But see *Gunnis v. Erhart*, 1 H. Black. R. 289; *Howard v. Braithwaite*, 1 Ves. & Beam. 209, 210; *Powell v. Edmunds*, 12 East, R. 6.

¹ *Hardacre v. Stewart*, 5 Esp. R. 103; *Adamson v. Jarvis*, 4 Bing. R. 66; S. C. 12 Moore, R. 241.

² *Adamson v. Jarvis*, 4 Bing. R. 66; S. C. 12 Moore, R. 241; *Medina v. Stoughton*, 1 Salk. R. 210; *Sanders v. Powell*, 1 Lev. 129; *Crosse v. Gardner*, Carth. R. 90.

³ *Merryweather v. Nixon*, 8 T. R. 186; *Adamson v. Jarvis*, 4 Bing. R. 66; S. C. 12 Moore, R. 241.

⁴ *Merryweather v. Nixon*, 8 T. R. 186; *Adamson v. Jarvis*, 4 Bing. R. 72.

among the bidders, while they themselves are secured from risk by a secret understanding with the vendor, that they shall not be bound by their bids. And in respect to these persons, the rule of law is, that, if their bidding operate to mislead and deceive the buyer, it will vitiate the sale. If, therefore, all of the bidders, except the buyer, be bidding for the vendor, or if the bid, immediately preceding the last bid of the buyer, be by a by-bidder or puffer, the sale is voidable by the buyer.¹ But if a person, or persons, be employed to bid up to a certain sum, in order to prevent a sacrifice of the property, and the price be afterward raised by real bidders, the sale will be valid.² Again, the vendor may employ by-bidders, or puffers, if he give notice to the other bidders of his intention; since, in such a case, it would not operate as a fraud.³ But in all cases, it behoves the vendor to be careful in making any such secret arrangement; as such bad faith is looked upon with great suspicion in courts of justice, and the cases leave it somewhat doubtful, whether a more stringent rule might not be applied.⁴ Where property is advertised to be sold "*without*

¹ *Bramley v. Alt*, 3 Ves. Jr. 621; *Veazie v. Williams*, 3 Story, R. 620; *Wheeler v. Collier*, Mood. & Malk. 125; *Howard v. Castle*, 6 T. R. 642; *Bexwell v. Christie*, Cowp. R. 396; *Smith v. Clarke*, 12 Ves. Jr. 477; *Crowder v. Austin*, 3 Bing. R. 368; *Sugden on Vend.* 18, 19; *McDowell v. Simms*, 6 Iredell, Eq. R. 278.

² *Smith v. Clarke*, 12 Ves. Jr. 477; *Conolly v. Parsons*, 3 Ves. 625, note; *Bramley v. Alt*, 3 Ves. 622; *Veazie v. Williams*, 3 Story, R. 620; *Steele v. Ellmaker*, 11 Serg. & Rawle, 86.

³ *Wheeler v. Collier*, Mood. & Malk. 125; *Crowder v. Austin*, 3 Bing. R. 368; *Oldfield v. Round*, 5 Ves. R. 508.

⁴ The rule of law, applicable to this class of cases, is far from being distinctly settled. The cases are quite contradictory, and cannot be harmonized; but the weight of doctrine seems to be, upon the whole, the rule propounded in the text. The first case in which the question as to the effect of puffers at an auction sale, came before the Court, was in *Bexwell v. Christie*, Cowp. R. 396; in which Lord Mansfield held the practice to be a fraud upon the buyer and on the public. "The question then is," said he, "whether the owner can *privately* employ another person to bid for him? —

reserve," the vendor is excluded from any interference with the sale, either directly or indirectly, which might, under any pos-

The basis of all dealings ought to be good faith; so more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder; that could never be the case, if the owner might secretly and privately enhance the price, by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent, that good men give into the ways of the bad and dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is fraud upon the sale, and upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower: such a direction would be fair." This case is recognized and the same rule adopted by Lord Kenyon, in *Howard v. Castle*, 6 T. R. 643, in which he says: "I will not go into the general reasoning on this subject, because it is very ably stated by Lord Mansfield in the case alluded to. Only part of that reasoning has now been adverted to by the plaintiff's counsel, but the rest of it is applicable to this case. The whole of that reasoning is founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man. The acts of parliament that have been referred to did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. In the case cited, Lord Mansfield mentioned an instance in which the owner may legally and fairly bid at the auction, namely, where before the bidding begins he gives public notice of his intention; and in such a case no duty is to be paid under the acts of parliament that have been referred to. The circumstance of puffers bidding at auction has been always complained of; if the first case of this kind had been tried before me, perhaps I should have hesitated a little before I determined it; but Lord Mansfield's comprehensive mind saw it in its true colors, as founded in fraud; he met the question fairly, and made a precedent which I am happy to follow." But Lord Rosslyn, in *Conolly v. Parsons*, 3 Ves. R. 625, notes, questions the soundness of this opinion, and doubts whether "the judgment of one person is deluded and influenced by the bidding of others." He says: "This point comes now before me very much by surprise. I should not have thought the case decided by Lord Mansfield bore much upon it. The last case carries a great degree of authority with it; but I fancy it turned upon the circumstance, that there was no real bidder; and the person refused instantly. It was one of those trap auctions that are so frequent in this

sible circumstances, affect the right of the highest bidder to be considered as the purchaser, whatever bid he may make.¹

city. The reasoning goes large, certainly ; and does not at all convince me. I should wish it to undergo a reconsideration ; for if it is law, it will reduce every thing to a Dutch auction, by bidding downwards. I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid ; that the judgment of one person is deluded and influenced by the bidding of others. It may weigh, if *A*, a skilful man, *B*, a cautious man, and *C*, a wealthy man, are in competition ; but where it is publicly known that persons are employed to bid, it would be very foolish in any one to let himself be so influenced."

"I have seen public advertisements of lots put up again as lots bought in for the owner. If it is considered as a contract with all the world, he cannot countermand the sale and sell by private contract. They meet upon these terms : the seller has fixed the value in his own mind, but hopes to get more ; the buyer has done the same, but hopes to get it for less. They stand entirely equal. If it is unfair for the seller to get more, it is equally unfair for the buyer to get it for less. It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under a price the seller thinks to be a reasonable price. There are several articles sold almost always by auction, that could not possibly be sold so, if the vendor was not allowed somebody to look after his interest. There are not above three or four purchasers of scarce and valuable books ; they would divide them, if the person selling has not some means of guarding against that. I should be extremely glad to find any case that would draw into consideration what might be all the consequences of applying that philosophical doctrine, as I call it, to sales by auction. It goes no farther in point of authority than when the purchaser declares off immediately." So, also, Sir William Grant, in *Bramley v. Alt*, 3 Ves. R. 622, limits the rule to cases, where all the bidders, except the purchaser, are puffers. This case was one, where one person only bid for the vendor at £75 per acre, and then, afterwards, in a contest of real bidders among themselves, the estate was run up to £100 17s. an acre, and this was held not to avoid the sale. In the opinion he says : "It is contended, as a point established by *Howard v. Castle*, 6 Term Rep. 612, that neither courts of law nor of equity will support this sale. I have looked into that case, which was relied upon at the trial, and is the only defence

¹ *Thornett v. Haines*, 15 Law Journal, N. S. 230 ; *Robinson v. Wall*, 11 Jurist (Eng.) 577 ; 2 Phillips, Eq. R. 372.

And in such cases he should be especially careful to abstain from all interference with the sale. Thus, where, previously

set up against the performance of this agreement. Upon that case, there is no doubt that no man shall be compelled to abide by such a bargain; no person being present but the buyer and the persons bidding on behalf of the seller; and in consequence of his zeal he was induced to bid; thinking he was bidding against real purchasers. The Judges were of opinion that it was a mere fraud upon him as a purchaser; that a man going to an auction has a right to expect that he is bidding against real purchasers. He may be induced upon that supposition, which he has a right to make, to give as much as any man will for himself; and if he is induced to bid by that method, he has been the dupe of a fraud. I perfectly subscribe to that; but is this a case of that complexion; and am I to understand that, if at any sale any one person bids for the seller without having declared it, though he ceased to bid, and the purchaser pursued his bidding against *bonâ fide* bidders, he shall, from the mere circumstance of that one person bidding for the seller, avail himself of that to put an end to his contract? I can collect no such thing; and should be sorry that was to prevail. On the contrary, I see it expressly stated, that no other persons were present but those who bid on the part of the seller. I am told the Lord Chancellor, in a late case, intimated that he could not consider himself bound to hold that the purchaser could refuse to abide by the contract, because there were persons who bid for the seller. I do not know whether his Lordship gave any opinion. I have no doubt that if there were none but puffers, and a person was induced by that method to give more than the value, neither courts of law nor of equity would support it. I was amazed to find no witnesses were examined for the defendant; but it now appears that the reason which induced his counsel very properly not to call any, thinking it would be in vain, was, that several days afterwards he confirmed the sale by paying part of the auction duty; which he states by his answer he was rather inveigled into. The fact is, that at the sale one person was authorized to bid for the seller as far as 75 guineas; and did so. It is said that ought to have been proclaimed. No doubt a man may buy in an estate; for the Statutes authorize the auctioneer not to pay the duty if it is bought in; but it is said that ought to be an open declared thing. Where is the difference between that and setting it up at 75 guineas? The Judge's report shows this fictitious bidder did not induce him to go on; for afterwards began the contest between him and Mills, who swears he was a real bidder. Can I say the defendant was induced by the fraud of the seller to bid what he would not have given if he had not been so induced? Therefore, without impugning the authority of

to the sale of a life-interest, which was advertised to be "without reserve," the vendor entered into a private agreement with

that case, to which as stated I perfectly subscribe, I am clearly of opinion that no fraud was practised upon the defendant; that he was bidding at a fair sale, and became the purchaser; and I do not believe the judges meant that, if one person was bidding for the seller that shall vitiate the bargain, if under all the circumstances that does not operate as a fraud upon the buyer. This contract, therefore, ought to proceed." In *Smith v. Clarke*, 12 Ves. R. 481, Sir W. Grant held, that, where a person was employed to bid up to a certain sum to prevent a sacrifice of the property, the purchaser was bound by the sale, though the bid immediately previous to the last bid was made by the puffer. This relaxation of doctrine is approved of in *Steele v. Ellmaker*, 11 Serg. & Rawle, 86; and in *Jenkins v. Hogg*, 2 Const. R. 821; and in *Wolfe v. Luyster*, 1 Hall, R. 146. But in the late case of *Crowder v. Austin*, 3 Bing. R. 368, the doctrine of Lord Mansfield, in *Bexwell v. Christie*, is adopted. In this case, the plaintiff sought to recover the price of a horse sold to him by the defendant at a public auction, one condition of which auction was, that the horse should be sold to the best bidder. The defendant resisted the contract on the ground that after a *bonâ fide* bidder had bid £12, a servant of the plaintiff's, stationed by him at the auction, made repeated biddings up to £23, and it was held by the whole court that the transaction was a fraud, which vitiated the sale, and that the doctrine of Lord Mansfield was the correct one. In the still later case of *Veazie v. Williams*, 3 Story, R. 624, the doctrine stated in the text was held by Mr. Justice Story. In this case, certain mill privileges were sold at auction, and the auctioneer made sham-bids, by which the price was greatly enhanced; but as the action was brought against the sellers who had never authorized the sham-bidding of the auctioneer, the case was not decided simply on the ground of fraud. In the opinion delivered by Mr. Justice Story in this case, after reviewing the cases on this subject, he said: "It appears to me that there is room for some distinctions upon this subject, which if they do not fully reconcile the cases, are at all events, well adapted to subserve the purposes of private justice and convenience, as well as public policy. Where all the bidders at the sale, except the purchaser, are secretly employed by the seller, and yet are apparently real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, there the sale ought to be held a fraud upon the purchaser, because he has been intentionally deluded by them. But where there are real bidders, as well as secret bidders for the sellers there, if the last bid before the purchaser's bid be a real bid, and no

another person, that the latter should bid a certain sum at the auction, and be the purchaser at that sum, unless a higher sum

intentional deceit has been practised by what have been sometimes called decoy ducks, to mislead or surprise the judgment or discretion either of other real bidders or of the purchaser, there seems to be a solid ground to hold that the sale is valid, and for the very reasons stated by Lord Loughborough and Lord Alvanley. It seems to me that Sir William Grant, in *Smith v. Clarke*, (12 Ves. R. 477, 482,) has pointed out the true line of distinction in his comments upon the cases; and although he did not then express any positive opinion, it is sufficiently evident what his opinion was — an opinion entitled to very great weight, for he was among the ablest judges that ever graced the Courts of Equity of England. He there said: ‘After the case of *Bramley v. Alt*, and what Lord Rosslyn stated to be his strong and clear opinion in *Conolly v. Parsons*, it would be too much for me to say this is in itself a fraud; unless I could say every direction by a vendor to any person to bid in his behalf, is of itself such a fraud as to vitiate every agreement that takes place at an auction, at which that direction is given. In *Bexwell v. Christie*, very general and broad principles are laid down by the Court of King’s Bench; beyond any that the case immediately before the Court required. The subsequent case, *Howard v. Castle*, proceeded upon the ground of plain and direct fraud; Lord Kenyon stating that it appeared at the trial to be bottomed in fraud; that it was fraud from beginning to end. There was no real bidder; and there were several bidders for the vendors. Whenever I shall be able to state the same proposition of any case, I shall come to the same conclusion. But it is clear, Lord Kenyon had not always entertained the same opinion as to the doctrine in *Bexwell v. Christie*; for in *Twining v. Morrice*, he states with respect to bidders being employed for the vendors, that he does not say the doctrine in *Bexwell v. Christie* is wrong; but everybody knows that such persons are constantly employed. In *Bramley v. Alt*, Lord Alvanley expresses his opinion that it is perfectly legal for a man to state a price, below which he would not permit a sale; and his lordship observes that there is no difference between setting up the lot at a given price, and employing a person to prevent a sale under that price; if that is communicated. I do not mean to state a proposition so general as that there can be no fraud through the medium of persons employed by the vendors. Lord Rosslyn appears, in *Conolly v. Parsons*, to doubt whether there can be that species of fraud: whether, in any case, the purchaser can be said to be defrauded merely by being drawn in through eagerness of zeal and competition with others. I do not go that length; for if the person is employed, not for the defensive precaution with a view to

were bid, a bill by the vendor for specific performance against a third party who had been declared the purchaser at the auction, though for a much higher price, was dismissed.¹

prevent a sale at an under-value, but to take advantage of the eagerness of bidders to screw up the price, I am not ready to say that it is such a transaction as can be justified in a Court of Equity. Neither do I say that if several bidders are employed by the vendor, that in such a case a Court of Equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It is not necessary for the defensive purpose of protection against a sale at an under-value. I leave those cases to be determined upon those grounds whenever they may occur. It is sufficient to say this is not a case of that description. These plaintiffs had not a fraud in contemplation; and were not in a situation that made it peculiarly incumbent upon them to take care not to permit a sale at an under-value.' Mr. Chancellor Kent, in his learned Commentaries, (Vol. 2, p. 538, 539, 5th ed.), seems to me to have arrived at the true and just and satisfactory result. 'It would seem,' (says he), 'to be the conclusion, from the latter cases, that the employment of a bidder by the owner, would or would not be a fraud, according to circumstances tending to show innocence of intention or a fraudulent design. If he was employed *bonâ fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner, to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. So it will be a void sale if the purchaser prevails on the persons attending the sale to desist from bidding, by reason of suggestions by way of appeal to the sympathies of the company.' But be the general doctrine upon this subject as it may, no case has fallen under my notice, in which it has been held that the act of the auctioneer in receiving or making false bids, unknown and unauthorized by the seller, would avoid the sale. And upon principle, it is very difficult to see why it should avoid the sale, since there is no fraud, connivance, or aid, given by the seller to the false bids. If the purchaser is misled by the false bids of the auctioneer to suppose them to be real, he may have an action against the auctioneer for the injury sustained thereby. But what has the innocent man to do with such a transaction — which he has, in no sense, sanctioned?'"

¹ Robinson v. Wall, 2 Phillips, 372.

§ 483. If, however, the seller do not authorize the auctioneer or by-bidder to make sham bids, he is not liable in an action

See, also, *Rex v. Marsh*, 1 Younge & Jerv. 331; 1 Story, Eq. Jurisp. § 245, and note. So, also, Mr. Chancellor Kent, in his Commentaries, lays down the rule that "in sound policy, no person ought, in any case, to be employed secretly to bid for the owner against the *bonâ fide* bidder, at a public auction. It is a fraud on the very face of the transaction." 2 Kent, Comm. Lect. 39, p. 539. See, also, *Baham v. Bach*, 13 Louisiana R. 287; *Woods v. Hall*, 13 Louisiana R. 411. In *Twining v. Morrice*, 2 Bro. Ch. R. 326, a specific performance was refused upon the ground that the solicitor of the seller was present, and bid, although he, in reality, did not bid for the seller. See the remarks on that case in *Ex-parte Lacey*, 6 Ves. R. 629, and *Townshend v. Stangroom*, 6 Ves. R. 338. See, also, the note (b) to Perkins's edition of Brown's Ch. R. 331. The actual by-bidding by puffers, can, as it would seem, only operate upon the buyers as a deceit, or fraud, or surprise, and must always, if it have any influence, be injurious to their interests. The doctrine of Lord Mansfield seems to us to be founded in principle, and to create no practical difficulty; the only objection that has been offered to it, namely, is, that it might lead to a sacrifice of goods for less than their value, can be easily obviated by the precautions which he recommends, of setting them up at a certain upset price. This rule is also upheld in the Scottish Law. In *Anderson v. Stewart*, (16th Dec. 1814,) it was held, that a sale made where puffers were employed, could not stand. In this case, Lord Glenlee said: "There is good ground for complaint when the price has been raised by unreal and fictitious offers, for, notwithstanding, it is said that a person ought to judge for himself, yet he is entitled to redress if any such improper means are used to draw him on. At the same time this is a very delicate question. A person going to a public sale, takes his chance of biddings being made out of frolic, or out of malice, by persons who have no desire to purchase, but, as they run the risk of the property falling in their hands, he must just take his chance of such things. That, however, is a different case from offers which are altogether fictitious, for against any thing of that kind the purchaser is entitled to redress; and I think the offers here were fictitious." In *Grey v. Stewart and others*, (7th Aug. 1753,) the same doctrine was held, and in the judgment of the court it is said: "The person who advertises a sale by auction, pledges his faith to the public, that he is to sell to the highest bidder, and is not to buy for himself. In this case, the pursuer was really the highest offerer, seeing the offer of a white bonnet is no offer at all." See, also, Cicero de Officiis, l. 3; Huber, Prælectiones, xviii. 2, 7. See, however, *Moncrieff v. Goldborough*, 4 Harr. & McHenry, 282; *Donaldson v. M'Roy*, 1 Brown, R. 346; *Morehead v. Hunt*, 1 Dev. & Batt. Eq. R. 35.

by the buyer, although such sham bids were made, because he is wholly disconnected from the fraud ; and the remedy of the buyer is against the party making the sham bids.¹

§ 484. Again, any combination or confederation of persons, for the purpose of preventing competition at an auction sale, and depressing the price of the property below the fair market value, is voidable, on the ground that it is a fraud upon the seller, as well as against public policy, and tending injuriously to affect the character and value of sales by auction.² But if the association of bidders be formed for honest and just purposes, and do not conflict with the rights and interest of the seller, — as, if it be for the purpose of enabling them to purchase together what they could not purchase separately, — their agreement will be valid, as being no fraud on the public, while it is a positive advantage to the seller.³ It must, in such cases, be clearly proved, that the association was for honest and just purposes, and did not operate as a fraud, or any agreement between the parties not to bid against each other will be void.⁴

¹ *Veazie v. Williams*, 3 Story, R. 620 ; *S. C.* 8 Howard, Sup. Ct. R. 134.

² *Phippen v. Stickney*, 3 Metcalf, R. 387, 388 ; *Jones v. Caswill*, 3 Johns. Cas. 29 ; *Doolin v. Ward*, 6 Johns. R. 191 ; *Wilbur v. Howe*, 8 Johns. R. 441 ; *Thompson v. Davis*, 13 Johns. R. 112 ; *Brown on Sales*, § 523, 824 ; 1 Story, Eq. Jurisp. § 293.

³ *Phippen v. Stickney*, 3 Metcalf, R. 387, 388 ; *Smull v. Jones*, 1 Watts & Serg. 128 ; *Smith v. Greenlee*, 2 Dev. R. 122 ; *Wolfe v. Leyster*, 1 Hall, R. 146 ; *Jenkins v. Hogg*, 2 Const. S. C. R. 821. In New York, however, this distinction is not adhered to, but in all cases an agreement not to bid against particular persons, or not to bid at all — is treated as a fraud. See *Jones v. Caswill*, 3 Johns. Cas. 29 ; *Doolin v. Ward*, 6 Johns. R. 194 ; *Wilbur v. Howe*, 8 Johns. R. 444 ; *Thompson v. Davies*, 13 Johns. R. 112. See, also, *Dudley v. Little*, 2 Ham. R. 505 ; *Platt v. Oliver*, 1 McClenn. 295 ; *Gulick v. Ward*, 5 Halst. R. 87.

⁴ *Ibid.*

CHAPTER XVII.

OF ILLEGAL AND FRAUDULENT SALES.

§ 485. THE next subject which we propose to consider is, the law applicable to illegal and fraudulent sales. And in this respect the first remark to be made is, that if a contract of sale be illegal, it is ordinarily wholly invalid, and cannot be enforced by either party, and is, in fact, no agreement to all, *nudum pactum*.¹ A fraudulent sale, however, is only voidable, and the right to nullify it resides solely in the party defrauded.²

§ 486. A contract of sale may be illegal, either because it violates the common law, or the statute law. Nor is there any difference, in respect to its illegality, whether it be in contravention of the one or the other. The old distinction, which once obtained between contracts essentially criminal and those which were prohibited by statute, between *mala prohibita* and *mala in se*,³ has long since been abrogated as utterly un-

¹ Pownell on Contracts, 176 to 178, (ed. 1790); Id. 182 to 207, 232, 233.

² *Parsons v. Hughes*, 9 Paige, R. 591; *Vigers v. Pike*, 8 Clark & Finnell. 562, 630; *Taylor v. Weld*, 5 Mass. R. 116; *Deady v. Harrison*, 1 Stark. R. 60; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; *Doe v. Roberts*, 2 Barn. & Ald. 134; 1 Story, Eq. Jur. 62; *Holman v. Johnson*, Cowp. 341; *Campbell v. Fleming*, 1 Adolph. & Ell. 40; *Hannay v. Eve*, 3 Cranch, R. 242; *Fermor's case*, 3 Co. R. 77; *Bright v. Eynon*, 1 Burr. R. 390; *Foxcroft v. Devonshire*, 1 W. Black. R. 193; *Duncan v. McCullough*, 4 Serg. & Rawle, 483; *Dingley v. Robinson*, 5 Greenl. R. 127; *Ferguson v. Carrington*, 9 Barn. & Cres. 59.

³ Blackstone says, in his Commentaries, Vol. 1, p. 58: "In relation to

founded, and it is now well established, that a contract, which contravenes the law, is void; and that, if it be prohibited by statute, with a penalty annexed, the penalty is not to be considered as a duty or impost, the payment of which renders the contract valid, but as a punishment for an improper act.¹

§ 487. A contract in violation of the Common Law, may be void, either because it is immoral, or because it is against public policy.

§ 488. And, in the first place, all contracts which tend directly to immorality, and are *contra bonos mores*, are void.² The maxim applicable to such cases, is, *ex turpi contractu non oritur actio*. The law does not, indeed, undertake to enforce every moral duty which may be binding upon the conscience of the individual, because from the difficulty of proof, the danger of prosecution, and the difference of opinions, it would

those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to non-compliance, here I apprehend conscience is no farther concerned than by directing a submission to the penalty in case of our breach of those laws; for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if ever such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; ‘either abstain from this, or submit to such a penalty;’ and his conscience will be clear, whichever side of the alternative he thinks proper to embrace.” See, also, *Johnson v. Hudson*, 11 East, R. 180; *Ex parte Dyster*, 2 Rose, Bank. Cas. 349; *Gremare v. Le Clerc Bois Valon*, 2 Camp. R. 144; *Comyns v. Boyer*, Cro. Eliz. 485.

¹ Story on Contracts, § 160, 161, 162; *Bartlett v. Vinor*, Carth. R. 252; *Clark v. Protection Ins. Co.* 1 Story, R. 109; *De Begnis v. Armistead*, 10 Bing. R. 110; *Cope v. Rowlands*, 2 Mees. & Welsb. 153; *Bensley v. Bignold*, 5 Barn. & Ald. 335; *Drury v. Defontaine*, 1 Taunt. R. 136.

² 1 Story, Eq. Jur. § 296; *Walker v. Pakins*, 3 Burr. R. 1568; *Franco v. Bolton*, 3 Ves. R. 368; *Gray v. Matthias*, 5 Ves. R. 286; *Matthews v. L—e*, 1 Madd. R. 558; *Clarke v. Periam*, 2 Atk. R. 333; 1 Pothier on Oblig. 23; 2 Ibid. 2.

not be enabled safely to adjust nice questions of morals. But wherever any contract is manifestly in furtherance of immorality, and tends directly to contaminate the public mind, or is directly forbidden, it will be utterly void. Thus, a bookseller or printseller cannot recover the price of books, or prints, or caricatures, of a grossly libellous, immoral, or obscene character, although they be sent in answer to an order therefor.¹ So, also, it is a good defence to an action for not supplying manuscript to complete a work, the copyright of which has been sold according to agreement, that the matter of the work is unlawful and immoral.² So, also, if clothes or goods of any kind be supplied to a prostitute for the purpose of enabling her to carry on her business of prostitution, and the seller expect to be paid therefor from the wages of her sin, the price could not be recovered by the seller.³ But the mere fact, that a woman, to whom goods are supplied, is a prostitute, will not invalidate the sale, if they be not supplied for any improper purpose, — as, if they be necessities, — although the seller know of her habits and mode of life.⁴ So, also, all contracts to pay a certain sum for illicit intercourse (*premium pudoris et pudicitie*) are void.⁵ Yet if the contract be executed, and the price paid, it will not be set aside either at law or in equity, on the ground that neither law or equity will meddle with corrupt contracts, either to enforce them, or to afford redress from them to a guilty party. The maxim, “*In pari*

¹ *Fores v. Johnes*, 4 Esp. R. 97; *Poplett v. Stockdale*, Ry. & Mood. 337.

² *Gale v. Leckie*, 2 Stark. R. 98.

³ *Bowry v. Bennett*, 1 Camp. R. 348; *Lloyd v. Johnson*, 1 Bos. & Pul. 340; *Jennings v. Throgmorton*, Ry. & Mood. 251; *Williamson v. Watts*, 1 Camp. R. 348; *Crisp. v. Churchill*, 1 Bos. & Pul. 340; *Appleton v. Campbell*, 2 Car. & Payne, 347; *Girardy v. Richardson*, 1 Esp. R. 13.

⁴ *Ibid.*; *Bowry v. Bennett*, 1 Camp. R. 348; *Girardy v. Richardson*, 1 Esp. R. 13.

⁵ *Matthews v. L—e*, 1 Madd. R. 558; *Binnington v. Wallis*, 4 Barn. & Ald. 650.

delicto potior est conditio defendentis," applies to all such cases.¹

§ 489. In the next place, all contracts, which are against public policy are void. What constitutes public policy it is difficult exactly to determine. It is in its nature uncertain, and indefinite, fluctuating with the change of habits and opinions, with the growth of commerce, and with the enlargement of international intercourse. But this rule may be safely laid down, that whatever contravenes an actual rule of policy, or which interferes injuriously with the true interests of society, is against public policy.

§ 490. The injurious effects of any contract, must, however, clearly appear, or it will not be void for this reason.² The effect, which the expansion of commerce and the growth of large cities has had upon the rules of public policy, is nowhere better illustrated than the change of opinion as to the effect of Forestalling, Regrating, and Engrossing, which were formerly held to be void as against public policy,³ but which now constitute the basis of profits, and one great means of trade. Forestalling is the buying or contracting for any merchandise, or victual on its way to market, or dissuading persons from bringing their provisions there. Regrating is the buying of

¹ This is the rule upon which the Courts of Equity, after long shifting and doubting, have finally settled. It has always been established at law. See 1 Story, Eq. Jur. § 296 to 298, 303, and cases cited. *Bromley v. Smith*, Doug. R. 697; *Vandyck v. Hewitt*, 1 East, R. 96; *Hawson v. Hancock*, 8 T. R. 575; *Tompkins v. Bernet*, 1 Salk. R. 22; *Collins v. Blantern*, 2 Wils. R. 347; *Lowry v. Bourdieu*, Doug. R. 468; *Inhab. of Worcester v. Eaton*, 11 Mass. R. 375; *Phelps v. Decker*, 10 Mass. R. 267, 274; *Smith v. Bromley*, Doug. R. 695.

² *Richardson v. Mellish*, 2 Bing. R. 242; *Roche v. O'Brien*, 1 Ball & Beat. 338.

³ *Rex v. Waddington*, 1 East, R. 142; 4 Black. Comm. 148; *Rose v. Maynard*, Cro. Cas. 231.

corn, or any dead victual in any market, and selling it again in the same market, or within four miles of the place. Engrossing is the getting into possession, by purchase, large quantities of corn, or dead victuals, for the purpose of selling them again.¹ These three prohibited acts are not only practised every day, but they are the very life of trade, and without them, all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider, that they would not now be held to be against public policy.

§ 491. There are, however, a large class of contracts which are manifestly against public policy, and which are always frowned upon in courts of justice, as interfering with the rights of individuals, and the best public interest. Among these are to be mentioned contracts in restraint of trade, or of marriage; marriage brokerage contracts; contracts to offend against the law or public duty; trading with an enemy without license; improper wages, and fraudulent sales. The consideration of most of these does not, however, properly belong to a treatise on sales, and we shall, therefore, only enumerate such few as are applicable to the subject now before us, and serve to illustrate the general rule.

§ 492. No contract of sale is good, by the terms of which the buyer is restrained *generally* in the carrying on of his trade; for a general restraint of trade is considered to be unreasonable, and against public policy.² But a contract for the *partial* restraint of trade, whereby the seller or buyer is restricted from carrying on his trade within reasonable limits, is binding.³ Thus, the good will of a trade may be bought and

¹ 4 Black. Comm. 148.

² *Mitchel v. Reynolds*, 1 P. Wms. R. 181; *Davis v. Mason*, 5 T. R. 118; *Horner v. Ashford*, 5 Bing. R. 326.

³ *Pemberton v. Vaughan*, 10 Adolph. & Ell. (N. S.) 97. •

sold, on condition that the seller do not carry it on within a reasonable distance of the buyer.¹ But where the restraint of trade is wider and larger as to space, than the protection of the party, with whom the contract is made, can possibly require, it is considered as unreasonable in law, and the contract is void.² The reasonableness or unreasonableness of the restriction, as to place, will, however, always depend upon the circumstances of each case, — such as the position of the parties, the nature of the trade, the populousness of the neighborhood, and is properly a question for the jury.³ This rule does not, however, apply to the sale of patented inventions, or secrets, trade or art, which are allowed as an exception, for the purpose of encouraging science and inventive genius.⁴

§ 493. There is, however, a difference in respect to such contracts between a general restriction as to *place*, and a general restriction as to *time*; for the mere fact, that the duration of time, for which the restriction is made, is indefinite or perpetual, will not of itself avoid a contract, which is, in all other respects, reasonable and proper.⁵

¹ Heyward *v.* Young, 2 Chitty, R. 407; Bunn *v.* Guy, 4 East, R. 190; Horner *v.* Graves, 7 Bing. R. 743; Perkins *v.* Lyman, 9 Mass. R. 532; Pierce *v.* Fuller, 8 Mass. R. 223; Hitchcock *v.* Coker, in Error, 6 Adolph. & Ell. 453; Thompson *v.* Means, 11 Smede & Marsh. 604.

² Hitchcock *v.* Coker, 6 Adolph. & Ell. 451; Horner *v.* Graves, 7 Bing. R. 735; Davis *v.* Mason, 5 T. R. 118; Mitchel *v.* Reynolds, 1 P. Wms. R. 181.

³ Hitchcock *v.* Coker, 6 Adolph. & Ell. 447; Horner *v.* Graves, 7 Bing. R. 735; Ward *v.* Byrne, 5 Mees. & Welsb. 548; Hinde *v.* Gray, 2 Scott, N. R. 123; Archer *v.* Marsh, 6 Adolph. & Ell. 967.

⁴ Bryson *v.* Whitehead, 1 Sim. & Stu. 74; Vickery *v.* Welch, 19 Pick. R. 526.

⁵ Hitchcock *v.* Coker, 6 Adolph. & Ell. 447; Horner *v.* Graves, 7 Bing. R. 735; Bunn *v.* Guy, 4 East. R. 190; Chesman *v.* Nainby, 2 Strange, R. 739; S. C. 2 Lord Raym. R. 1456; Wilkins *v.* Evans, 3 Younge & Jerv. 318; Ward *v.* Byrne, 5 Mees. & Welsb. 548.

§ 494. Again, a sale or contract for the sale of a public office of trust is void ; upon the ground, that it tends to destroy the responsibility of the office, and to betray the interests of the public.¹ But it would seem, that a contract for a private office, of which the other party is cognizant, and does not refuse his assent, would be good, if it were not manifestly productive of injurious results.² So, also, the profits and emoluments of a public office of trust are not a good subject of sale. Thus, it has been held, that the prize money of a sailor, or the full pay, or half pay, of an officer, is not assignable at law,³ nor in equity ;⁴ upon the ground, that any salary paid for the performance of a public duty ought no to be perverted to other uses than those for which it was intended.

§ 495. Again, an agreement between two or more persons not to bid against each other at auction is, as we have seen, considered as void whenever it operates as a fraud, and is done for the purpose of preventing competition. Although, if it be *bonâ fide*, and made for the purpose of enabling the two together to purchase what either alone would not, or could not,

¹ *Blachford v. Preston*, 8 T. R. 89 ; *Card v. Hope*, 2 Barn. & Cres. 661 ; *East Ind. Co. v. Neave*, 5 Ves. Jr. 173 ; *Thomson v. Thomson*, 7 Ves. R. 470 ; *Morris v. McCulloch*, Ambler, R. 432 ; 1 Story, Eq. Jur. § 295 ; *Chesterfield v. Jannsen*, 1 Ves. R. 155 ; *Waldo v. Martin*, 4 Barn. & Cres. 319 ; *Cardigan v. Paige*, 6 N. Hamp. R. 183 ; *Lewis v. Knox*, 2 Bibb, R. 453 ; *Hopkins v. Prescott*, 4 Man. Gray, & Scott, 578. *Nulla aliâ re magis Romana Respublica interiit, quam quod magistratûs officia venalia erant.* Co. Litt. 234, a.

² *Richardson v. Mellish*, 2 Bing. R. 242, 243, 246, 247.

³ *Lidderdale v. Montrose*, 4 T. R. 248 ; *Flarty v. Odium*, 3 T. R. 681 ; *Barwick v. Reade*, 1 H. Black. R. 627.

⁴ *Stone v. Lidderdale*, 2 Anstr. R. 533, in which the case of *Stuart v. Tucker*, 2 W. Black. R. 1137, holding the contrary doctrine, is expressly overruled. See *Palmer v. Bate*, 2 Brod. & Bing. 676 ; *Arbuckle v. Cowton*, 3 Bos. & Pul. 321 ; *Flarty v. Odium*, 3 T. R. 681 ; *Methwood v. Walfank*, 2 Ves. R. 238 ; *Meredith v. Ladd*, 2 N. Hamp. R. 517 ; *Cardigan v. Paige*, 6 N. Hamp. R. 183.

it will be held to be valid.¹ This doctrine is founded in public policy.

§ 496. Again, a contract of sale is void as against public policy, whenever it is in violation of a statute. And this brings us to our second division of Illegal Contracts. We have already seen, that the old distinction between *mala prohibita* and *mala in se*, does not now obtain, and that a contract in violation of a statute is equally void, whether it be expressly prohibited, or whether it only have a penalty annexed to its performance. The doctrine, as laid down by Lord Holt, is, "that every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender ; because a penalty implies a prohibition, though there are no prohibitory words in the statute."²

§ 497. There has, also, been a distinction lately drawn between cases where a contract violates a statute law designed for the protection of the public, and where it violates a statute law, which is merely designed for the protection of the revenue. And it has been held, that where there was a mere breach of a revenue regulation, which was protected by a specific penalty, and there was no fraud upon the revenue, and no clause in the statute, making the contract illegal, that it was valid, and only subjected the party to the payment of the penalty.³ But this

¹ Ante, § 455 ; *Veazie v. Williams*, 3 Story, R. 620.

² *Bartlett v. Vinor*, Carth. R. 252. See, also, *De Begnis v. Armistead*, 10 Bing. R. 110 ; *Langton v. Hughes*, 1 Maule & Selw. 596 ; *Drury v. Defontaine*, 1 Taunt. R. 136 ; *Helps v. Glenister*, 8 Barn. & Cres. 553 ; *Clarke v. Protection Ins. Co.* 1 Story, R. 119 ; *Wheeler v. Russell*, 17 Mass. R. 258 ; *Forster v. Taylor*, 5 Barn. & Adolph. 889 ; *Springfield Bank v. Merrick*, 14 Mass. R. 322 ; *Hunt v. Knickerbacker*, 5 Johns. R. 327 ; *Story on Contracts*, § 220, and cases cited ; *Bell v. Quin*, 2 Sandf. Sup. Ct. R. 146.

³ *Johnson v. Hudson*, 11 East, R. 180 ; *Brown v. Duncan*, 10 Barn. & Cres. 98 ; *Hodgson v. Temple*, 1 Taunt. R. 181.

distinction has not found favor, and seems now to be abrogated, and the true rule seems to be, as laid down by Baron Parke, that "notwithstanding some *dicta* apparently to the contrary, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which has made it so, has in view the protection of the revenue, or any other object."¹

§ 498. There seems, however, to be a distinction between cases where the statute is merely directory in its terms, and the terms, which are not complied with, are only collaterally connected with the contract, and cases where the statute is directly prohibitory, and its requisitions are conditions precedent, directly affecting the contract. And in the former case, it would seem, that the contract was merely voidable, and not void.² Thus, although an assignment of a patent, or a deed, is required by statute to be recorded, yet as this requisition is merely directory, and for the purpose of giving notice to *bonâ*

¹ *Cope v. Rowland*, 2 Crompt. Mees. & Rosc. 157. In *Wetherell v. Jones*, 3 Barn. & Adolph. 221, Lord Tenterden says: "When a contract which a party seeks to enforce is expressly, or by implication, forbidden by the statute or the common law, no court will lend its assistance to give it effect; and there are numerous cases in the books in which an action on the contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, or sound policy. But where the consideration, and the matter to be performed, are *both legal*, we are not aware that a plaintiff has ever been prevented from recovering by an infringement of the law *not contemplated by the contract*, in the performance of something to be done on his part." This last distinction is the true one, for in such case, where the statute is merely directory, the contract is uncontaminated with illegality. See, also, *Forster v. Taylor*, 5 Barn. & Adolph. 889; *Little v. Poole*, 9 Barn. & Cres. 200, 201.

² *Ferguson v. Norman*, 5 Bing. N. C. 84; *Cope v. Rowland*, 2 Mees. & Welsb. 149; *Little v. Poole*, 9 Barn. & Cres. 192; *Warren v. Manuf. Ins. Co.* 13 Pick. R. 518; *Ward v. Wood*, 12 Mass. R. 539; *The Brig Draco*, 2 Sumner, R. 157; *Brooks v. Byam*, 2 Story, R. 542; *Johnson v. Hudson*, 11 East, R. 180.

fide purchasers for a valuable consideration, it does not render the assignment void.¹

§ 499. The rule, therefore, is, that wherever any thing is prohibited by statute, a contract in violation thereof is wholly void. Thus, where the statute of 17 Geo. 3, ch. 42, required, that bricks should be made of particular dimensions under a penalty, it was held, that the seller could not recover the price of bricks of different dimensions.² So, also, the selling of pheasants being prohibited by statute, it was held, that a sale of pheasants, though executed, passed no title therein to the buyer.³ So, also, a note given for shingles, not surveyed, and not of the dimensions required by the statute, forbidding the sale, was held to be void.⁴ So, also, a sale is invalid, which contravenes those statutes,⁵ which aim at the establishment of uniformity in weights and measures; and which prohibit the sale of lottery tickets, or shares of tickets.⁶ So, also, a sale of shares in an illegal company cannot be enforced.⁷

§ 500. So, also, all contracts made in violation of the statute of 29 Charles II., ch. 7, s. 1, forbidding persons from “exercising any worldly labor, business, or work of their ordinary (or secular) callings, upon the Lord’s day, or any part thereof,

¹ Brooks *v.* Byam, 2 Story, R. 542.

² Law *v.* Hodgson, 11 East, R. 300.

³ Helps *v.* Glenister, 8 Barn. & Cres. 553.

⁴ Wheeler *v.* Russell, 17 Mass. R. 258. See, also, Springfield Bank *v.* Merrick, 14 Mass. R. 322.

⁵ Tyson *v.* Thomas, McLell. & Younge, 119; Wheeler *v.* Russell, 17 Mass. R. 258; Coombs *v.* Emery, 2 Shepley, R. 404; Hospital of St. Cross *v.* Howard de Walden, 6 T. R. 338; Watts *v.* Friend, 10 Barn. & Cres. 448; Smith on Merc. Law, p. 481.

⁶ Dee *v.* Shee, 2 T. R. 617; Roby *v.* West, 4 N. Hamp. R. 385; Hunt *v.* Knickerbacker, 5 Johns. R. 327; Biddes *v.* James, 6 Binn. R. 331; Clarke *v.* Havens, 1 Marsh. R. 198.

⁷ Josephs *v.* Febrer, 3 Barn. & Cres. 639.

(works of necessity or charity alone excepted,") come under the general rule, and are void.¹ Thus, where a horse was sold on Sunday, upon a warranty, the warranty was held to be void.² But this statute only prohibits the exercise of business or work of the ordinary calling of the party ; and, therefore, it does not apply to any bargain made out of the ordinary calling

¹ The statutes of New Hampshire, Rhode Island, and South Carolina, follow the statute of 29 Chas. II. as set forth in the text. But by the statutes of Maine, Vermont, Massachusetts, Connecticut, New York, and Pennsylvania, *every kind* of secular labor is prohibited on Sunday, whether it be in the ordinary calling of the party or not. The courts of these States have, with the exception of Massachusetts, declared all contracts made in violation of this statute, void. "But the judicial opinions in Massachusetts seem to indicate a different doctrine ; and although there is no express decision which contradicts the general doctrine, there are some *dicta* which point that way. In the case of *Geer v. Putnam*, 10 Mass. 312, which was assumpsit on a promissory note, the defendant pleaded in bar, that it was made on Sunday ; to which the plaintiff replied by a general demurrer. Judgment being rendered for the plaintiff, in the Common Pleas, the defendant brought a writ of error in the Supreme Court, where his counsel abandoned the point, and the judgment was affirmed. But the general question was not considered by the court at all, it not being necessary ; for the *plea* was clearly bad, on general demurrer, for not alleging, either that the note was made within that part of the Lord's day on which secular business is prohibited, or was not within the exception, in respect to works of necessity or charity. The judgment, therefore, was right upon the defective state of the pleadings. In *Clap v. Smith*, 16 Pick. 247, the authority of *Geer v. Putnam*, was recognized, and the opinion of the court founded thereupon ; in this case, it was said by Wilde, J. that the case of *Geer v. Putnam*, having been so long before the public, and no attempt having been made in the legislature to change the exposition of this law, the statute might be considered as expounded by public opinion, and, therefore, as not prohibiting the making of contracts on that day. This, however, was extra-judicial ; for, in the case at bar, the question was, whether an assignment, in general terms, referring to a schedule annexed, which was executed on Saturday, but the assignment not being annexed untill Sunday, was valid. Here, also, it did not appear on what part of the day the schedule was annexed ; but the court held, that, if the assignment were *void*, yet the plaintiff's title was good, as supported by verbal proof of a delivery to him in trust.

² *Lyon v. Strong*, 6 Verm. R. 219.

of the party.¹ The validity of a sale, therefore, which is made on Sunday will depend upon, whether it is or is not made by the seller in his ordinary calling, — and the purchaser may avail himself of the contract, if he did not know that the vendor of the sale was exercising his ordinary calling; although the vendor cannot sue for the price.² Nor does it matter as to the validity of such a sale, whether it be made privately or publicly.³

§ 501. The ordinary calling of a man, within the meaning of the statute, is only understood to embrace his peculiar business, or trade, and does not extend to ordinary acts done by him, without relation thereto. Thus, the hiring of a laborer by a farmer, is not a violation of this statute, although the contract be made on Sunday.⁴ So, also, an agreement made by an attorney on Sunday, binding him personally to a settlement of his client's affairs, is good.⁵

§ 502. But a contract for the sale of goods will not be void under the statute unless it be made legally complete on Sunday. If it be a mere bargaining without a definite agreement, — or if

¹ *Rex v. The Inhab. of Whitnash*, 7 Barn. & Cres. 602; S. C. 1 Mann. & Ryl. 452; *Drury v. Defontaine*, 1 Taunt. R. 131; *Bloxsome v. Williams*, 3 Barn. & Cres. 233.

² *Ibid.*; *Bloxsome v. Williams*, 3 Barn. & Cres. 232; S. C. 5 Dowl. & Ryl. 82; *Fennell v. Rider*, 5 Barn. & Cres. 406; S. C. 8 Dowl. & Ryl. 204; *Myers v. State*, 1 Conn. R. 502.

³ *Fennell v. Rider*, 5 Barn. & Cres. 406; S. C. 8 Dowl. & Ryl. 204. But see *Boynton v. Paige*, 13 Wend. R. 425. The sale of liquor by an Innholder on Sunday is not within the act against profaning the Lord's day; he being obliged to keep a public house of entertainment. *Hall v. State*, 4 Harring. 132. The ordinance of the City of Cincinnati, prohibiting "trading," &c. on Sunday, is void as to those who conscientiously observe the seventh day of the week as the Sabbath. *City of Cincinnati v. Rice*, 15 Ohio, 225.

⁴ *Rex v. The Inhab. of Whitnash*, 7 Barn. & Cres. 596.

⁵ *Sandiman v. Breach*, 7 Barn. & Cres. 96.

it do not comply with the requisitions of the Statute of Frauds, so as to be legally binding, it will be valid. Thus, where a horse was bought by parol on Sunday, but was not delivered until Monday, it was held to be a valid sale, because the sale was not made binding on Sunday under the Statute of Frauds.¹ But if the contract be virtually settled on Sunday, and all the terms agreed upon, it would be doubtful whether the mere deferring of the signature thereto until Monday, would render it valid.²

§ 503. Again, all trading during war with the enemy with knowledge that he is so, is prohibited, unless it be made with the special permission of the government. It follows, therefore, that every contract of sale made with an enemy, without license, is void.³ But if the alien enemy be under the protection of the government, — as, where he comes into the country under a license, or is suffered to remain there by special permission, — his contracts are valid.⁴ So, also, if one party be deceived by the other, and trade with him, not knowing that he is an enemy, he may, after the return of peace, sue him, but not before. But where a limited license is given to import certain goods from the enemy's port, if others be taken on board, not permitted by the license, the contract is merely

¹ *Bloxsome v. Williams*, 3 Barn. & Cres. 232; *Fennell v. Ryder*, 8 Dowl. & Ryl. 204; S. C. 5 Barn. & Cres. 406; *Williams v. Paul*, 6 Bing. R. 653.

² *Smith v. Sparrow*, 4 Bing. R. 87. A contract though closed up on Sunday, yet if it be affirmed on a subsequent day, becomes valid. *Adams v. Gay*, 19 Vermt. (4 Washb.) R. 358.

³ See *Griswold v. Waddington*, 15 Johns. R. 57; S. C. 16 Johns. R. 438, in which the whole subject of the legality of commercial intercourse between belligerents is thoroughly discussed. 1 Kent, Comm. Lect. 6, p. 68; *Scholefield v. Eichelberger*, 7 Peters, R. 586; Story on Bills of Exchange, § 99 to 105; *Seaman v. Waddington*, 16 Johns. R. 510.

⁴ *Patton v. Nicholson*, 3 Wheat. R. 207, note; *Crawford v. The Wm. Penn*, Peters, C. C. R. 106.

void as to the unlicensed articles, and binding on the remainder.¹

§ 504. Where a contract of sale is founded upon two considerations, one of which is merely void but not illegal, and, the other is good, the contract will be binding, and entitle the party to damages, to the extent of the good consideration; provided, by its terms, it be susceptible of apportionment.² Thus, where there was a verbal agreement to sell a certain farm, and dead stock, and growing wheat, at separate prices, it was held, that the contract was distinct as to each item, and although the agreement as to the land was void, because it did not comply with the requisitions of the Statute of Frauds, it being oral, yet that the agreement as to the wheat, and dead stock, was binding.³ If, however, the contract be an entirety, the partial failure of the consideration would wholly invalidate it.⁴ But where one consideration, or a part of the consideration, is illegal, the whole contract is void.⁵ So, also, as there is a consideration moving from each side in every contract, the same rule applies to an agreement to do two or more acts;

¹ *The Rebecca*, 5 Rob. R. 102; *Maissonaire v. Keating*, 2 Gall. R. 324, 337, 341; Story on Bills of Exchange, § 101.

² *Bliss v. Negus*, 8 Mass. R. 51; *Crisp v. Gamel*, Cro. Jac. 128; *Pickard v. Cottels*, Yelv. R. 56; Com. Dig. Assumpsit, B. 13; *Best v. Joly*, 1 Sid. R. 38; *Cripp v. Golding*, 1 Roll. Abr. 30; *Action Sur Cas.* 7, 2; *Bret v. J. S. and his wife*, Cro. Eliz. 755.

³ *Mayfield v. Wadsley*, 3 Barn. & Cres. 361; S. C. 5 Dowl. & Ryl. 228. See, also, *Wood v. Benson*, 2 Crompt. & Jerv. 94.

⁴ *Roby v. West*, 4 N. Hamp. R. 285; *Chater v. Becket*, 7 T. R. 200; *Loomis v. Newhall*, 15 Pick. R. 167; *Lexington v. Clarke*, 2 Kent, R. 223; *Crawford v. Morell*, 8 Johns. R. 253.

⁵ *Waite v. Jones*, 1 Bing. N. C. 662; *Featherston v. Hutchinson*, Cro. Eliz. 199; *Lewis v. Davidson*, 4 Mees. & Welsb. 654; *Stevens v. Webb*, 7 Car. & Payne, 60; *Shackell v. Rosier*, 2 Bing. N. C. 646; *Scott v. Gilmore*, 3 Taunt. R. 226; *Bridge v. Cage*, Cro. Jac. 103; *Card v. Hope*, 2 Barn. & Cres. 661; *Jones v. Waite*, 7 Scott, 317; S. C. 5 Bing. N. C. 341; *Filson v. Himes*, 5 Barr. R. 452.

and in such a case, if one be illegal, and the other be legal, the contract is void; but if one be merely void and insufficient, and the other be good, the contract is valid.¹ But if the agreement be to do an act, which may be effected either by lawful or unlawful means, the law will presume in favor of the contract, that the parties contemplated the employment of legal means.²

§ 505. We have seen that a contract in direct and immediate violation of the law is utterly void; but the rule is not limited to such cases. And if a bargain of sale, though legal in itself, be made for the express purpose of furthering a violation of the law, — as by enabling a third person to do an illegal act, — it will be void. Thus, where a party knowingly sold drugs to a brewer, to be used in his brewery, contrary to the provisions of the statute; it was held, that he could not recover the price; although it did not appear that the drugs were actually used in the brewery.³ So, also, where goods were sold, and delivered on board ship, to be exported to the East Indies, and by statute, all contracts made by his majesty's subjects for supplying such a ship with a cargo to that place was prohibited, and a bond was given for the price, it was held, that the vendor could not recover in an action on the bond.⁴

§ 506. But the mere fact that the seller knows that the goods sold will be applied to an unlawful purpose, will not

¹ *Lewis v. Davidson*, 4 Mees. & Welsb. 654; *Stevens v. Webb*, 7 Car. & Payne, 60.

² *Ibid.*

³ *Langton v. Hughes*, 1 Maule & Selw. 493. See, also, *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Steers v. Lashley*, 6 T. R. 61.

⁴ *Lightfoot v. Tenant*, 1 Bos. & Pul. 551. See, also, *Parkin v. Dick*, 2 Camp. R. 221; *S. C.* 11 East, R. 502; *Holman v. Johnson*, Cowp. R. 341; *Cannan v. Bryce*, 3 Barn. & Ald. 185; *Billard v. Hayden*, 2 Car. & Payne, 472.

ordinarily be sufficient to deprive him of his right to payment therefor; he must be, in some manner, implicated in the transaction, and privy thereto.¹ The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is to be found in the question, whether the contract, on which the claim is founded, can be wholly disconnected from the illegal transaction, or whether it was in furtherance thereof.² Wherever goods have been sold for the express purpose of enabling a party to violate the law, they have been held to be void.³

§ 507. Another class of cases to which this rule is applicable, is where the subject of sale is to be *smuggled* by either party. An executory contract for the purchase and sale of goods not imported, and to be smuggled, would, of course, be void, as the very consideration, being in violation of the statute, would be illegal.⁴ But an executed contract of sale for goods already imported would not be void, even although the buyer knew them to have been smuggled, — unless the sale were in pursu-

¹ *Holman v. Johnson*, Cowp. R. 311; *Clarke v. Shee*, Cowp. R. 334; S. C. 2 Doug. R. 698, n.; *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311; *Waymell v. Read*, 5 T. R. 599. See, also, *Brown on Sales*, § 185, 186.

² *Simpson v. Bloss*, 7 Taunt. R. 246; S. C. 2 Marsh. R. 542; *Petrie v. Hannay*, 3 T. R. 418; *Aubert v. Maze*, 2 Bos. & Pul. 371; *Farmer v. Russell*, 1 Bos. & Pul. 295; *Tennant v. Elliott*, 1 Bos. & Pul. 3; *Armstrong v. Toler*, 11 Wheat. R. 271; *Phalen v. Clark*, 19 Conn. R. 421; *Hook v. Gray*, 6 Barb. S. C. R. 398; *Leavitt v. Blatchford*, 5 Barb. Sup. Ct. R. 9; *Filson v. Himes*, 5 Barr. R. 452.

³ *Gas Light Co. v. Turner*, 5 Bing. N. C. 666; S. C. in Error, 6 Bing. N. C. 324; *Langton v. Hughes*, 1 Maule & Selw. 593; *Cannan v. Bryce*, 3 Barn. & Ald. 179.

⁴ *Clarke v. Shee*, Cowp. R. 334; *Thomson v. Thomson*, 7 Ves. R. 493; *Armstrong v. Toler*, 11 Wheat. R. 271; *The George, the Bothnea, the Janstaff*, 1 Wheat. R. 408; *The George*, 2 Wheat. R. 278; *Tennant v. Elliott*, 1 Bos. & Pul. 3; *Farmer v. Russell*, 1 Bos. & Pul. 295; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Catlin v. Bell*, 4 Camp. R. 183.

ance of an original agreement, entered into before the smuggling, and operating as inducement thereto.¹ Thus, if A should, during war, contrive an illegal plan for importing goods from the country of the enemy, on his own account, and goods should be sent to B in the same vessel, and A should, at the request of B, become surety for the payment of the duties on B's goods, — or should assume the responsibility of the expenses which might be incurred on account of a prosecution for illegal importation, — or should advance money to B, to enable him to pay those expenses, — A might maintain an action on the promise of B to refund the money; because, if the act constituted no part of the original scheme, the contract would be founded on a new and legal consideration, unconnected with the original act, though remotely caused by it.²

§ 508. So, also, where goods are sold to the vendee to be smuggled by him, the validity of the contract will depend upon whether or not the contract for the sale was wholly independent of the smuggling.³ If the vendor do any act in furtherance of the smuggling, — or if he assume any risk for the importation, — or be implicated in the illegality, — the contract will be void.⁴ Thus, if he pack them in a particular manner, by order of the buyer, with the knowledge that they are to be smuggled, and for the purpose of affording facility for smug-

¹ Ibid.

² *Armstrong v. Toler*, 11 Wheat. 279. See *Brown on Sales*, § 189, 190, 191.

³ Ibid.; *Holman v. Johnson*, Cowp. R. 341; *Clarke v. Shee*, Cowp. R. 334; S. C. 2 Doug. R. 698, n.; *Waymell v. Read*, 5 T. R. 599; *Bernard v. Reed*, 1 Esp. R. 91; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311; *Catlin v. Bell*, 4 Camp. R. 183; *Brown on Sales*, § 187, 188.

⁴ Ibid.

gling,¹—or if he agree to deliver them at their place of destination, so that the contract is not complete before the smuggling,²—the contract is wholly void. But the mere fact of knowledge that they are to be smuggled afterwards would not alone invalidate the sale, if the contract were completed before the goods were smuggled, and if the vendor do no act to assist the vendee or further his illegal plans.³

§ 509. Again, where goods are prohibited from importation, the same rule applies. If the vendor connive at, or assist the importation, the contract is void. Thus, if the vendor should make out false invoices of goods to enable the vendee to import them,—or should, after receiving a bill of exchange for the price, state the goods in the invoice at a lower and false price, to enable the vendee to avoid paying the legal duty,—in both cases he could not recover.⁴

¹ *Waymell v. Read*, 5 T. R. 599; *Bernard v. Reed*, 1 Esp. R. 91; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466.

² *Clarke v. Shee*, Cowp. R. 334; S. C. 2 Doug. R. 698, n.

³ *Holman v. Johnson*, Cowp. R. 341; *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311; S. C. 1 Gale, R. 187; *Brown on Sales*, § 182. The same rule obtains in the Law of Scotland. *Walker v. Falconer*, 27 Feb. 1757; *More v. Steven*, 13 Nov. 1765; *Att'y of Cullen v. Philp*, 15 May, 1793.

⁴ *Pellecat v. Angell*, 2 Crompt. Mees. & Rosc. 311; S. C. 1 Gale, R. 187; 5 Tyrw. R. 915. Professor Bell, in his *Treatise on the Contract of Sale*, p. 22, 23, says: "The result of all the cases on this subject (smuggling) seems to be; (1.) That no contract for importing or exporting goods in order to defeat the revenue laws, can be enforced, whether the person so acting be a native or a foreigner. (2.) That the mere sale by a merchant abroad, whether a native of this country or a foreigner, of goods which the buyer afterwards smuggles into this country, is not illegal, nor is an action denied upon the contract to the seller. (3.) That every one, participant in the attempt to evade the revenue laws, by furnishing the means of facilitating the intention to smuggle, is to be held a party to the illegal contract, and action is denied to him. (4.) That, in the balancing of evidence, the circumstance of the seller being a native, gives a bias against him. (5.) That,

§ 510. We now come to the consideration of *Fraudulent Sales*. We have already had occasion, in a former part of this work, fully to treat of Actual Fraud as between the direct parties to a contract, both in regard to its nature and consequences.¹ It would seem unnecessary, therefore, again to repeat in this place the rules of law applicable to this branch of the subject of fraudulent sales, further than to state, generally, that if there be fraud practised between the parties, whether it be by misrepresentation, or concealment, or by artifice of any kind, or by silence, or by any act of any kind, which operates to deceive the other as to an essential matter, the whole contract is void. It may, also, be as well to state here, that where the vendee purchases goods, with the intent not to pay for them, it is a direct fraud, which vitiates the contract, and in some States, in this country, would subject him to a criminal prosecution.²

§ 511. But fraud may not only be practised by one party to a contract on the other party, — but may also be the result of a confederation of both parties to defraud third persons. And it is in this latter aspect that we now propose to consider it.

§ 512. It has always been the policy of the law to protect creditors against any acts or contract by the debtor to their

on a sale of goods prohibited to be imported, or known to be smuggled, action will not be sustained for the price on the one hand, or for the delivery of the goods on the other. (6.) That the purchase in *bonâ fide* of goods not prohibited, but which have been smuggled, is effectual.’’

¹ Ante, § 158 to 182.

² *Earl of Bristol v. Wilmore*, 3 Dowl. & Ryl. 756; S. C. 1 Barn. & Cres. 514; *Stevenson v. Hart*, 4 Bing. R. 476; *Ferguson v. Carrington* 9 Barn. & Cres. 59; *Strutt v. Smith*, 1 Crompt. Mees. & Rosc. 312; *Bradbury v. Anderton*, 5 Tyrw. 152; S. C. 1 Crompt. Mees. & Rosc. 486; *Conyers v. Ennis*, 2 Mason, R. 236; *Lupin v. Maine*, 6 Wend. R. 77; *Rowley v. Bigelow*, 12 Pick. R. 307. See also Mass. Rev. Statutes.

injury, whether they operate as direct frauds, or merely as constructive frauds. To subserve this policy, the statute of 13th Elizabeth, ch. 5, was passed, declaring all conveyances of goods and chattels not made *bonâ fide*, and upon good consideration, but in trust for the use of the person conveying them, or made to hinder, delay, or defraud creditors, to be void. This statute has been reenacted in New York, and has been universally adopted in America, in all its essential provisions.¹ Indeed, its only effect was to give a more stringent force to the doctrines of the Common Law in relation to fraud, and it has been said by Lord Mansfield, that the Common Law would have attained every end proposed by this statute, and the statute of 27th Elizabeth, against fraudulent or voluntary conveyances, to defeat subsequent purchasers.² Independently of these statutes, a gift or conveyance, without a good or a valuable consideration to support it, would, on general principles, be invalid.³

§ 513. These statutes do not apply at all to cases where conveyances are made *bonâ fide*, for a valuable consideration, nor to conveyances for a good consideration, (such as affection of blood,) unless the party be so deeply indebted at the time, or in such embarrassed circumstances that the conveyance was virtually a fraud upon his creditors. For, as has been said, it behoves a man to be just before he is generous, and if he be deeply indebted, his creditors have claims upon his property, which he is not at liberty to overlook. But if a man be not indebted, or only indebted to a small amount, and be wholly unembarrassed, and able at the time to make the conveyance,

¹ 1 Story, Eq. Jur. § 352, 353; 2 Kent, Comm. Lect. 39, p. 515.

² Cadogan v. Kennett, Cowp. R. 439. See, also, Hamilton v. Russell, 1 Cranch, R. 316; Meeker v. Wilson, 1 Gall. R. 419; 2 Kent, Comm. Lect. 39, p. 515; Whitmore v. Woodward, 28 Maine, (15 Shepl.) R. 302.

³ Copis v. Middleton, 2 Madd. R. 428; Partridge v. Gopp, 1 Eden, R. 166, 167, 168; 1 Story, Eq. Jur. § 353; George v. Stubbs, 26 Maine, (13 Shepl.) R. 243.

his subsequent misfortune will not entitle creditors to set aside the conveyance.¹ In this respect, the cases, however, are by no means free from diversity of opinion ;² but this arises only from a difference of opinion, as to what constitutes sufficient evidence of fraud, — in all cases where fraud appears, the conveyance is void. A voluntary conveyance of property, which would not be liable to be taken in execution for the payment of debts, would not, however, come within the purview of these statutes, because it could not operate as an injury to creditors.³ A voluntary conveyance is good against the grantor, and his heirs, and all persons claiming under him, in privity of estate, with notice of the fraud, and can only be set aside at the instance of the creditors, or their representatives.⁴

§ 514. An insolvent debtor may, however, at Common Law, make a voluntary assignment of his goods for the benefit of all

¹ *Hinde's Lessee v. Longworth*, 11 Wheat. R. 199 ; *Verplanck v. Sterry*, 12 Johns. R. 536 ; *Reade v. Livingston*, 3 Johns. Ch. Cas. 497, 501 ; *Sexton v. Wheaton*, 8 Wheat. R. 229 ; *Blunett v. Bedford Bank*, 11 Mass. R. 421 ; *Cadogan v. Kennett*, Cowp. R. 432 ; 1 Story, Eq. Jur. § 362, 362 a, 363, 364, 365.

² See 1 Story, Eq. Jur. § 355 to 365, in which Mr. Justice Story reviews the principal cases, and gives the weight of his opinion in favor of the rule, as stated in the text. The Supreme Court of the United States has held the same doctrine. *Sexton v. Wheaton*, 8 Wheat. R. 229 ; *Hinde's Lessee v. Longworth*, 11 Wheat. R. 199. And it is in accordance with the case of *Cadogan v. Kennett*, Cowp. R. 402, and *Doe v. Routledge*, Cowp. R. 705 ; and the recent case of *Townsend v. Westcott*, 2 Beav. R. 340, 345. So, also, see *Salmon v. Bennett*, 1 Conn. R. 525, in which the same rule is sustained by the Supreme Court of Connecticut. and *Verplanck v. Sterry*, 12 Johns. R. 536.

³ *Dundas v. Dutens*, 1 Ves. Jr. 196 ; S. C. 2 Cox, R. 196 ; *M'Carthy v. Gould*, 1 Ball & Beat. 390 ; *Grogan v. Cooke*, 2 Ball & Beat. 233 ; *Caillaud v. Estwick*, 2 Anstr. R. 381 ; *Nantes v. Cornock*, 9 Ves. 188, 189 ; *Rider v. Kidder*, 10 Ves. R. 368 ; *Guy v. Pearkes*, 18 Ves. R. 196, 197 ; *Matthews v. Teaver*, 1 Cox, R. 278 ; 1 Story, Eq. Jur. § 367.

⁴ 1 Story, Eq. Jur. § 371 ; *Randall v. Phillips*, 3 Mason, R. 378 ; *Curtis v. Price*, 12 Ves. R. 103.

his creditors, or for any number of his creditors. The mere fact, that it may operate to the injury of a particular creditor, does not invalidate it. And in such a case, if there be no fraud, the creditor not included in the agreement can only satisfy his debt out of the surplus.¹ So, also, at Common Law, he may assign or transfer his property to a particular creditor, for the purpose of giving him a preference of payment over all others; provided such assignment, or transfer, be for a legal and valuable consideration, and be not manifestly excessive as a security of the debt.² But where there is a statute of Bankruptcy, it supersedes any arrangement which may be made between the debtor and creditor, in contravention of its policy and provisions.³ It is not necessary, ordinarily, that the creditors should be technically parties to the assignment, or give an express assent thereto at the time it is made; for if they subsequently sign it, or expressly assent to it, or receive the benefit thereof, it is good against all persons, except intervening attach-

¹ *Holbird v. Anderson*, 5 T. R. 235; *Pickstock v. Lyster*, 3 Maule & Selw. 371; *Stevens v. Bell*, 6 Mass. R. 342; *Murray v. Riggs*, 15 Johns. R. 571; *Haven v. Richardson*, 5 N. Hamp. R. 113; *Burd v. Smith*, 4 Dall. R. 85; *Ingraham v. Wheeler*, 6 Conn. R. 277; *Halsey v. Whitney*, 4 Mason, R. 211.

² *Pickstock v. Lyster*, 3 Maule & Selw. 371; *The King v. Watson*, 3 Price, Exch. R. 6; *Wilt v. Franklin*, 1 Binney, R. 502; *Stevens v. Bell*, 6 Mass. R. 339; *Hendricks v. Robinson*, 2 Johns. Ch. Cas. 307, 308; *Nicoll v. Mumford*, 2 Johns. Ch. Cas. 529; *Brown v. Minturn*, 2 Gall. R. 557; *Moffat v. McDowall*, 1 McCord, Ch. R. 434; *Buffum v. Green*, 5 N. Hamp. R. 71; *Marbury v. Brooks*, 7 Wheat. R. 556; *Brashear v. West*, 7 Peters, R. 608; *Grover v. Wakeman*, 11 Wend. R. 194; 2 Kent, Comm. Lect. 39, p. 531. In Georgia, and in New Jersey, and Ohio, and Massachusetts, and Connecticut, the rule is changed by statute. See *Varnum v. Camp*, 1 Green (N. J.) R. 326; *Prince*, Dig. 164; Stat. of Ohio, 1838; Mass. Insolvent Act of 1838; Stat. of Conn. 1838.

³ *Halsey v. Whitney*, 4 Mason, R. 210, 211; *Binus v. Towsey*, 3 Nev. & Park. 91; *Davies v. Acocks*, 2 Crompt. Mees. & Rosc. 461; *Knight v. Ferguson*, 5 Mees. & Wels. 389.

ing creditors.¹ Indeed, if the assignment be absolute, their assent will be presumed ; but if it be conditional, as that the creditors shall release their debts, the same presumption does not arise.² But secret preferences, made to particular creditors, to induce them to join in a general assignment, are considered as frauds upon the other creditors, who execute the instrument in ignorance thereof.³

§ 515. Nor is it permitted only to the debtor, by making an assignment, to give a priority to a particular creditor or class of creditors by a *bonâ fide* conveyance. But it is also permitted to any creditor to acquire a preference *in invitum* by an attachment. And if there be both an attachment and an assignment, that shall prevail which is first in point of time ; neither is considered as a constructive fraud upon the other, unless it be an actual fraud.⁴

§ 516. Again, the mere fact, that an assignment is conditional, and requires a general release of liability from the creditors, or that it does not purport to convey all the property of the debtor, or reserves the ultimate surplus to the debtor, will

¹ *Halsey v. Whitney*, 4 Mason, R. 210, 215 ; *Hastings v. Baldwin*, 17 Mass. R. 552 ; *Marbury v. Brooks*, 7 Wheat. R. 556 ; 11 Wheat. R. 78. See, however, *Widgery v. Haskell*, 5 Mass. R. 144. But see *Brashear v. West*, 7 Peters, R. 608 ; *Ellison v. Ellison*, 6 Ves. R. 656.

² *Halsey v. Whitney*, 4. Mason, R. 210 ; *Marbury v. Brooks*, 7 Wheat. R. 556 ; S. C. 11 Wheat. R. 78 ; *Seaving v. Brinkerhoff*, 5 Johns. Ch. R. 329 ; *Thompson v. Leach*, 2 Vent. R. 198 ; *Austin v. Bell*, 20 Johns. R. 442 ; *Small v. Marwood*, 9 Barn. & Cres. 300 ; *Estwick v. Caillaud*, 2 T. R. 381 ; *Pickstock v. Lyster*, 3 Maule & Selw. 371.

³ 1 Story, Eq. Jur. § 378, and cases there cited ; *Chesterfield v. Jansen*, 1 Atk. R. 352 ; *Spurrit v. Spiller*, 1 Atk. R. 105 ; *Smith v. Bromley*, Dougl. R. 696, note.

⁴ *Halsey v. Whitney*, 4 Mason, 213 ; *Marbury v. Brooks*, 7 Wheat. R. 566 ; S. C. 11 Wheat. R. 73 ; *Hatch v. Smith*, 5 Mass. R. 42 ; *Cadogan v. Kennett*, Cowp. R. 432.

not render it fraudulent. The question, whether an assignment, on condition that a release should be given, is not in violation of the statute, and does not tend to delay and defeat the claims of creditors, has much embarrassed the courts, and has been subject to some difference of opinion; but the rule seems finally to be settled, that such a condition does not invalidate the assignment.¹

¹ *Halsey v. Whitney*, 4 Mason, R. 230. In this case, Mr. Justice Story very fully reviews the cases in this country relating to this subject. He says: "A far more difficult question, is that presented by the consideration, whether a debtor can rightfully stipulate for a release from his creditors, as the condition of yielding up his property to them. I am aware, that it may be said, that the property may be reached by a trustee process, so that it cannot be absolutely locked up from his creditors. But the question never can be, whether a remedy exists for the creditors, but whether the debtor has not endeavored fraudulently to delay or defeat them. This objection has struck me to be of great force, and I have paused upon it with no small hesitation of opinion. Where a debtor assigns all his property for the benefit of all his creditors, without stipulating for any favor to himself, he cannot be said to lock up his property from his creditors. The most that can be said is, that he locks it up from one, by giving it unconditionally to all. But where he stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors by withholding from them all his property, unless they are willing to take what he pleases to give, or is able to give, in discharge of their debts. This is certainly a delay, and if the assignment be valid, to some extent a defeating of their rights. It is not sufficient to say, that it is a proposition to creditors; so would be a condition by the debtor to receive a gross sum. The object and nature of the proposition are to be considered, in order to decide whether it be fraudulent or not. Has it not a tendency to obstruct the common rights of the creditors? Is not its design to prevent creditors from receiving compensation out of the debtor's property, without yielding up some portion of their debts, and conferring on him a substantial benefit, which he has no legal claim to demand? In *Seaving v. Brinkerhoff* (5 Johns. Ch. R. 329,) where there was an assignment of real estate (not purporting to be all the estate of the debtor) for the use of all the creditors, upon the condition of their executing a release, that very learned judge, Mr. Chancellor Kent, held that the assignment was, on that account, fraudulent and void,

§ 517. Another example of fraudulent sales is to be found in the fictitious sale called *mohatra*, by which one party sells to

and that the condition was oppressive, and without any color of justice, as the assignment was not of all the property of the debtor, but only of a part. The reasoning of the Court in *Hyslop v. Clarke* (14 Johns. R. 459,) though the case itself was distinguishable from the present, is, as far as it goes, strong against such a stipulation, where the assignment is of all the property. That case, and its reasoning, met the entire approbation of Chief Justice Spencer, in his able opinion in *Austin v. Bell* (20 Johns. R. 442); and on that occasion, the latter, in behalf of the Court, declared, 'that a deed, which does not fairly devote the property of a person overwhelmed with debt to the payment of creditors, but reserves a portion to himself, unless the creditor assent to such terms as he shall prescribe, is in law fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions.' Had the Court considered the principle fully adopted and recognized in *Seaving v. Brinkerhoff* (5 Johns. Ch. R. 329,) and *Burd v. Smith* (4 Dall. 76)? Tried by this principle, the stipulation in the present case would make the assignment utterly void, for the surplus, after payment of the assenting creditors, is to go to the debtor. The question is not (I repeat it,) and cannot be, whether there may not be some remedy for the creditors to intercept the surplus, but whether the intent, apparent upon the deed itself, be not to coerce them to a settlement by embarrassing or delaying their remedy. Such an intent is of itself illegal. In examining the Massachusetts Reports, the point does not appear to have met with any direct decision. In *Widgery v. Haskell* (5 Mass. R. 144,) *Ingraham v. Geyer* (13 Mass. R. 146,) and *Harris v. Sumner* (2 Pick. R. 129,) there are intimations, which might well lead one to doubt, if the Court were prepared to admit the validity of such a stipulation. On the other hand, in *Hatch v. Smith* (5 Mass. R. 42,) there was a stipulation for a release, and no exception was taken to it, though the cause was contested by very eminent counsel. The case turned, indeed, in the judgment of the Court, upon a point somewhat more close, for the creditors, to an amount beyond the property conveyed, agreed to the deed, before it was executed by the debtor, and the assignment was upheld. Then, again, in *Hastings v. Baldwin* (17 Mass. R. 552,) where the assignment was held not to be fraudulent, we are now told by the counsel, that there was such a stipulation, although it is omitted in the report, no question having been raised on that point. Yet doubtless, if the Court had thought such a stipulation *per se* fraudulent, that was as fit a case as could arise, for the application of the principle. The decisions in Massachusetts, therefore, leave the ques-

another on credit, and immediately, or soon after, purchases the subject-matter again of the pretended buyer, at a less price, which he pays in ready-money, while the former buyer still remains his debtor for the first price. This, it is evident, is merely a contract for a loan, and not a sale, although it is carried on with all the formalities of the latter contract; and, therefore, the pretended purchaser would only be liable for the sum actually received by him from the resale by him to the former seller.¹

§ 517 *a*. So, also, where in a sale of chattels, the title is passed, it cannot, so far as respects creditors, be transferred

tion in equilibrio. But when we take into consideration the great length of time, during which stipulations of this nature have prevailed in this State, without objection, there is much reason to believe, that the profession have deemed the law settled in favor of the debtor on this point. Then, on the other hand, in *Lippincott v. Barker* (2 Binn. 174,) where the direct point arose, it was settled, that a stipulation for a release was not fraudulent. The reasoning of the Court is limited, indeed, to the circumstances of that particular case, but it would be difficult not to perceive, that it naturally reaches further. I find also, that my brother, Mr. Justice Washington, in *Pierpont v. Lord*, in 1820, is reported to have held, that an assignment in trust, for the benefit of such creditors as should release their debts, is founded upon a sufficient consideration in law. The case is not in point, but it was probably decided on the general principle. There is, however, a case in England directly in point. It is *The King in aid of Braddock v. Watson* (3 Price, 6,) where the very exception was taken by counsel, and the assignment was held good by the Court of Exchequer against the claim of the Crown itself. The weight of authority is then in favor of the stipulation, for the decisions in New York did not turn upon the naked point of a release, but upon that, as incorporated into a peculiar trust. I am free to say, that, if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield, without reluctance, to what seems the tone of authority in favor of them." See *Small v. Marwood*, 9 Barn. & Cress. 300; *Goss v. Neale*, 5 Moore, R. 29.

¹ Pothier, *Contrat de Vente*, § 38.

again to the seller by a mere acknowledgment in writing, that the property is his, without a valuable consideration therefor.¹

§ 518. In the next place, let us consider what effect is to be given to contracts of sale in cases where the property is to remain in the possession of the vendor. In respect to the parties themselves, undoubtedly a sale is good, although the vendor be, by the terms of the agreement, to retain possession of the goods.² But in respect to creditors, unless the sale be entirely *bonâ fide*, or unless the subsequent possession by the vendor appear as merely a condition of an executory contract, the sale is void, as being a fraud upon creditors.³ If the conveyance, or

¹ *George v. Stubbs*, 26 Maine R. (13 Shepley,) 243.

² *Hawes v. Reader*, Cro. Jac. 270; *Martindale v. Booth*, 3 Barn. & Ald. 505; *Steel v. Brown*, 1 Taunt. R. 381; *Baker v. Lloyd*, Bull. N. P. 258; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; *Doe v. Roberts*, 2 Barn. & Ald. 367; *Deady v. Harrison*, 1 Stark. R. 60; *Banks v. Thomas*, 1 Meigs, R. 33; *Nichols v. Patten*, 18 Maine, R. 231; *Jones v. Yates*, 9 Barn. & Cres. 512.

³ *Edwards v. Harben*, 2 T. R. 587. In this case, Buller, J., said: "But if the deed or conveyance be *conditional*, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds, or bills of sale, which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as *accompanying and following* the deed. That case has been universally followed by all the cases since. One of the strongest is quoted in *Bucknal and others v. Roiston*, (Pr. in Chan. 287); there one Brewer, having shipped a cargo of goods, borrowed of the plaintiff 600*l.* on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff; there Sir E. Northey cited a case 'where a man took out execution against another; by agreement between them; the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and

bill of sale, be conditional on its face, and possession be not, by its terms, to be surrendered, until such condition is performed, the contract is binding against the creditors, if it be in other respects *bonâ fide*, and for a valuable consideration. So, also, if the transaction be *bonâ fide* and merely by way of mortgage, or collateral security, it would be good.¹ In many of the States in the United States, it is declared by statute that a mortgage

took the goods in execution : and it was held, that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property.' And he said it had been ruled forty times in his experience at Guildhall, that, if a man sells goods, and still continues in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The lord chancellor held in the principal case, that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him, as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken ; he supported the deed because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law ; that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent.' This case is also cited and approved by Mr. Ch. Just. Marshall, in *Hamilton v. Russel*, 1 Cranch, R. 309 ; *Cadogan v. Kennett*, Cowp. R. 432 ; *Jarman v. Wolloton*, 3 T. R. 618 ; *Stone v. Grubham*, 2 Bulst. R. 225 ; *Bucknal v. Roiston*, Prec. in Ch. 285 ; *Reed v. Wilmott*, 7 Bing. R. 577 ; S. C. 5 Moore & Payne, 553 ; *Tiffit v. Barton*, 4 Denio. R. 171.

¹ *Martindale v. Booth*, 3 Barn. & Adolph. 498 ; *Marshall v. Lloyd*, 2 Mees. & Welsb. 450 ; *Steward v. Lombe*, 1 Brod. & Bing. 510, 512 ; *D'Wolf v. Harris*, 1 Mason, R. 515 ; *Ward v. Sumner*, 5 Pick. R. 59 ; *Kidd v. Rawlinson*, 2 Bos. & Pul. 59 ; *Glover v. Austin*, 6 Pick. R. 220 ; *Conard v. Atlantic Ins. Co.* 1 Peters, R. 449 ; *Bissell v. Hopkins*, 3 Cowen, R. 166 ; *Holbrook v. Baker*, 5 Greenl. R. 109 ; *Edwards v. Harben*, 2 T. R. 595 ; *Armstrong v. Baldock*, Gow, R. 35.

shall not be considered as fraudulent, although possession is retained by the mortgagor; provided, that record thereof be duly made; for the record is considered as constructive notice of the transaction to the creditors.¹ The only effect of such statute would, however, seem to be in affirmation of the rule of the Common Law. But where the bill of sale, or conveyance, is absolute, and the vendor nevertheless retains possession, a presumption of fraud would in all cases arise. But whether the mere fact that the vendor is to retain possession, is to be considered as affording *prima facie* evidence of fraud, which may be rebutted by proof, — or as affording conclusive evidence of fraud, — is a question open to much doubt, and in respect to which the cases are distressingly contradictory.

§ 519. The first case on this subject, and one of the leading cases, is Twyne's case, which was decided in the Star Chamber in the forty-fourth year of the reign of Queen Elizabeth.² The facts of that case were as follows. Pierce was indebted to Twyne in £400, and was also indebted to C in £200. Pending an action by C to recover his demand, Pierce, being possessed of goods to the value of £300, secretly, by deed, conveyed all his goods and chattels to Twyne, in satisfaction of Twyne's debt. Pierce, however, continued in possession, and sold some of the goods, notwithstanding the deed, and sheared some

¹ Mass. Revised Statutes, part 2, tit. 6, ch. 74, § 5; *Forbes v. Parker*, 16 Pick. R. 462; *Bullock v. Williams*, 16 Pick. R. 33; *Shurtleff v. Willard*, 19 Pick. R. 202. See, also, Laws of New York, sess. 56, ch. 279; *Lee v. Huntoon*, 1 Hoffman, Ch. R. 458; *Camp v. Camp*, 2 Hill, R.; Statute of Kentucky, Dec. 13, 1820, Feb. 22, 1837, Feb. 1, 1839; Stat. of Georgia, Dec. 26, 1827; Stat. of Virginia, Dec. 1792, Feb. 1819; Indiana Rev. Stat. 1838, p. 470; Stat. of Tennessee, 1831; Stat. of Connecticut, 1838, p. 72, 73; Rev. Stat. of Vermont, 1839, p. 317. See 2 Kent, Comm. Lect. 39, p. 530, n.

² 3 Coke, R. 80; S. C. reported under the name of *Chamberlain v. Twyne*, Moore, R. 638. See, also, *Shep. Touchstone*, 66.

sheep that were a part of the effects, and marked them with his own mark. C having afterwards obtained judgment, endeavored to levy execution on the goods, but was resisted by Twyne. The question which the Court were called upon to decide, was, whether the conveyance was fraudulent by the statute of 13th Elizabeth; and they held, that it was, on the following grounds. "1st. That it had the signs and marks of fraud, because it is general, without exception of his apparel, or any thing of necessity; for it is commonly said, *quod dolus versatur in generalibus*. 2d. The donor continued in possession, and used them as his own, and by reason thereof, he traded and trafficked with others, and defrauded and deceived them.¹ 3d. It was made in secret, *et dona clandestina sunt semper suspiciosa*. 4th. It was made pending the writ.² 5th. There was a trust between the parties; for the donor possessed all and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the covert of fraud. 6th. The deed contains that the deed was made honestly, truly, and *bonâ fide*; *et clausulæ inconsuetæ semper inducunt suspicionem*."

§ 520. The next leading case on this subject was *Edwards v. Harben*.³ In this case, Mercer offered to Harben a bill of sale of sundry chattels as a security for a debt. This Harben refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should remain unpaid, to take possession of the goods, and sell them in satisfaction of the debt, returning the surplus money to Mercer. A bill of sale was accordingly executed, purporting on the face of it to be abso-

¹ See *Worsley v. Demattos*, 1 Burr. R. 482.

² See *Holbird v. Anderson*, 5 T. R. 235; wherein it was held, that a bill of sale will not be deemed fraudulent, merely because it was executed pending an action against the vendor.

³ 2 T. R. 587.

lute, and a corkscrew was delivered to Harben in the name of the whole. Mercer died within the fourteen days, and immediately upon their expiration Harben took possession of the goods and sold them. A suit was then brought by Edwards, a creditor of Mercer, charging Harben as executor in his own wrong; and the question was, whether this bill of sale was fraudulent and void, because it was not accompanied by a delivery of possession, although it was on its face absolute. It was determined to be fraudulent, and it was said by Buller, J., in the judgment, that all the judges of England had been consulted on a motion for a new trial in the case of *Bamford v. Baron*, and were unanimously of opinion that "unless possession accompanies and follows the deed, it is fraudulent and void,"¹ and he went on to say that "this principle had been long settled, and never had been seriously questioned, and took a distinction between bills of sale, which are to take place immediately, and those which are to take at some future time, on performance of a condition. He then continues: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent." In subsequent cases the same doctrine has been acted upon, and the case of *Edwards v. Harben* expressly affirmed.²

¹ In *Bucknal v. Roiston*, Prec. in Ch. 285, it was stated by one of the counsel, *arguendo*, that it had been ruled forty times in his experience at Guildhall, that if a man sells goods, and still continues in possession of them as visible owner, the sale was fraudulent and void, as to creditors.

² *Steel v. Brown*, 1 Taunt. R. 382; *Reed v. Wilmott*, 7 Bing. R. 583; S. C. 5 Moore & Payne, 564; *Paget v. Porchard*, 1 Esp. N. P. R. 205; *Wordell v. Smith*, 1 Camp. N. P. R. 332.

§ 521. But this doctrine, that possession of goods, sold under an absolute bill of sale, affords a conclusive presumption of fraud, seems to have been modified in England by the general current of the late cases; and, although there are some cases which maintain the doctrine of *Edwards v. Harben*, yet the weight of authority preponderates to the modified doctrine, that possession, in these cases, by the vendor, only affords a badge or *primâ facie* presumption of fraud. This doctrine was asserted by Lord Eldon, in the case of *Kidd v. Rawlinson*;¹ and afterwards affirmed by him in the case of *Lady Arundell v. Phipps*; ² on which referring to his former decision, he said: "The mere circumstance of possession of chattels, however familiar it may be to say it proves fraud, amounts to no more than that it is *primâ facie* evidence of property in the man possessing, until a title not fraudulent is shown, under which the possession has followed." Lord Mansfield, also, held, that possession was only a badge of fraud, and that, whether the circumstances created a necessary presumption of fraud, was a question for the jury.³ Lord Tenterden, also, was of opinion, that continued possession was not conclusive evidence of fraud.⁴ And Mr. Justice Parke, in the case of *Martindale v. Booth*,⁵ where there was an assignment of the furniture, household goods, and fixtures of a tavern, to secure payment of a debt, with a proviso for the grantee to take possession, on failure of payment of any of the instalments, and sell the property, and that the grantor until then should keep the possession, says: "I think the want of delivery of possession does not make a deed of sale of chattels absolutely void. The *dictum* of Buller, J. in *Edwards v. Harben*, has not been

¹ 2 Bos. & Pul. 59.

² 10 Vesey, R. 145.

³ *Martin v. Podger*, 2 W. Black. R. 701.

⁴ *Eastwood v. Brown, Ry. & Mood*, 312; *Martindale v. Booth*, 3 Barn. & Adolph. 505.

⁵ 3 Barn. & Adolph. 505.

generally considered in subsequent cases to have that import. The want of delivery is only evidence that the transfer was colorable. In *Benton v. Thornhill*,¹ it was said, in argument, that want of possession was not only evidence of fraud, but constitutes it; but Gibbs, Chief J., dissented; and although the vendor, after executing a bill of sale, was allowed to remain in possession, he, at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not." "It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatsoever for saying that this bill of sale was fraudulent." In this case, however, it will be observed, that the possession was consistent with the terms of the deed, and, therefore, it was not fraudulent within the rule of the case of *Edwards v. Harben*. In *Steward v. Lombe*, it was said by Lord Chief Justice Dallas, that "the case of *Edwards v. Harben* has been dissented from often," and by Mr. Justice Parke, that "doubts have arisen as to the extent of the doctrine there laid down."² In *Latimer v. Batson*,³ Lord Chief Justice Abbott said, "I perfectly agree, that possession is to be much regarded; but that is with a view to ascertain the good or bad faith of the transaction." "Here the jury have affirmed the good faith of the transaction. The question for their consideration was properly, whether this was a *bonâ fide* transaction, and that fact being ascertained, the subsequent possession was unimportant."⁴ In *Hoffman v. Pitts*,⁵ Lord Ellenborough said, speaking of an assignment of chattels, made

¹ 2 Marshall, R. 427.

² 1 Brod. & Bing. 512, 513.

³ 7 Dowl. & Ryl. 110. See, also, S. C. 4 Barn. & Cres. 654.

⁴ *Wordall v. Smith*, 1 Camp. R. 332.

⁵ 5 Esp. R. 25.

without surrender of possession ; “The not taking possession, was, in some measure, indicative of fraud ; but was not conclusive. But to make it absolutely void, there must be something that showed the deed fraudulent in the concoction of it. It was incumbent on the person claiming title to show that the transaction was *bonâ fide*.”

§ 522. The conclusion to be drawn from these, and other English cases, asserting a similar doctrine, would, therefore, seem to be, that, by the modern rule, which obtains in England, the mere fact, that there is no change of possession after an absolute bill of sale has been made, would not, of itself, necessarily constitute such a fraud as to avoid the sale, — but that it is a badge of fraud, which, taken with the other circumstances of the case, may afford a conclusive presumption of fraud, or may be rebutted and explained, so as to render the sale valid.¹ All its effect is to afford a *primâ facie* presumption of fraud.

§ 523. The rule of law applicable to this subject, which obtains in America, is by no means settled, and the question is embarrassed by decisions which are utterly contradictory and irreconcilable.

§ 524. In the Supreme Court of the United States, the doctrine of *Edwards v. Harben*, that an absolute bill of sale or conveyance, without surrender of possession, is, of itself, conclusive evidence of fraud, has been affirmed to its full extent.

¹ See, also, to this point, *Eastwood v. Brown*, Ry. & Mood. 312 ; *Baldwin v. Cawthorne*, 19 Ves. R. 100 ; *Jezeph v. Ingram*, 1 Moore, R. 189 ; *Benton v. Thornhill*, 2 Marsh. R. 427 ; S. C. 7 Taunt. R. 149 ; *Reed v. Wilmott*, 5 Moore & Payne, 553 ; S. C. 7 Bing. R. 577 ; *Woodham v. Baldock*, 3 Moore, R. 11 ; S. C. Gow, R. 35 ; *Leonard v. Baker*, 1 Maule & Selw. 251 ; *Watkins v. Birch*, 4 Taunt. R. 823 ; 2 Kent, Comm. Lect. 39, p. 520 ; *Hoffman v. Pitt*, 5 Esp. R. 22.

In the case of *Hamilton v. Russell*,¹ Mr. Ch. Justice Marshall, after quoting fully from the case of *Edwards v. Harben*, proceeds to say: "This court is of the same opinion. We think the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring, that an absolute bill of sale is itself a fraud unless possession '*accompanies and follows the deed.*' This construction, too, comports with the words of the act. Such a deed must be sidered as made with an intent '*to delay, hinder, or defraud creditors.*'" The same doctrine is affirmed in the Circuit Court by Mr. Justice Story.²

§ 525. So, also, in the United States Courts, it is held, that, although possession be not given, yet if the bill of sale or conveyance be not absolute, but conditional, that the property shall remain in the possession of the vendor until performance of the condition, the sale would be fraudulent. So, also, if the bill of sale be, on the face of it, merely by way of mortgage, or security, and pursuant to an agreement between the parties, that the mortgagor shall retain possession, it would be valid.³

§ 526. But the doctrine, which is promulgated in the State Courts, differs in the different States. In Massachusetts,⁴

¹ 1 Cranch, R. 309. See, also, *Conard v. Atlantic Ins. Co.* 1 Peters, R. 449. See *Bissell v. Hopkins*, 3 Cowen, R. 189, and the cases there collected; *U. States v. Hooe*, 3 Cranch, R. 73.

² *Meeker v. Wilson*, 2 Gallison, R. 419.

³ *Hamilton v. Russell*, 1 Cranch, R. 309; *D'Wolf v. Harris*, 4 Mason, R. 515; *Conard v. Atlantic Ins. Co.* 1 Peters, R. 449; *Meeker v. Wilson*, 1 Gallison, R. 419; *U. States v. Hooe*, 3 Cranch, R. 73; *U. States v. Conyngham*, 4 Dall. R. 358; *Phettiplace v. Sayles*, 4 Mason, R. 321; *Barker v. French*, 18 Vermt. (3 Washb.) R. 460.

⁴ *Brooks v. Powers*, 15 Mass. R. 244; *Bartlett v. Williams*, 1 Pick. R.

Maine,¹ New Hampshire,² New Jersey,³ Tennessee,⁴ Kentucky,⁵ North Carolina,⁶ Ohio,⁷ Alabama,⁸ Georgia,⁹ and Mis-

288; *Holmes v. Crane*, 2 Pick. R. 607; *Wheeler v. Train*, 3 Pick. R. 255; *Ward v. Sumner*, 5 Pick. R. 59; *Shumway v. Rutter*, 7 Pick. R. 56; *S. C.* 8 Pick. R. 443; *Adams v. Wheeler*, 10 Pick. R. 199; *Marden v. Babcock*, 2 Metcalf, R. 99; *Briggs v. Parkman*, 2 Metcalf, R. 258. In the last case, Mr. Justice Wilde said: "It has always been held by this Court, that where a vendor continues in possession of the goods sold, after the sale, with the consent of the vendor, such a possession is only a badge or presumption of fraud, which it is proper to submit to a jury, and which may be explained, and the inference of fraud repelled by other evidence."

¹ *Reed v. Jewett*, 5 Greenl. R. 96; *Holbrook v. Baker*, 5 Greenl. R. 309; *Brinley v. Spring*, 7 Greenl. R. 211; *Ulmer v. Hills*, 8 Greenl. R. 326; *Cutter v. Copeland*, 18 Maine, R. 127. In this last case, the courts go so far as to affirm, that a mortgagor may, by an arrangement with the mortgagee, become the agent of the mortgagor, and retain the possession, without affording even *prima facie* evidence of fraud. See, also, *Barker v. French*, 18 Vermt. (3 Washburn,) R. 460; *Mills v. Warner*, 19 Vermt. (4 Washburn,) R. 609.

² *Haven v. Low*, 2 N. Hamp. R. 13; *Coburn v. Pickering*, 3 N. Hamp. R. 415; *Lewis v. Whittemore*, 5 N. Hamp. R. 364; *Ash v. Savage*, 5 N. Hamp. R. 515.

³ *Sterling v. Van Cleve*, 7 Helst. R. 235; *Bank of New Brunswick v. Hassert*, Saxton, N. J. Ch. R. 1; *Mount v. Hendricks*, 2 South, R. 738; *Cumberland Bank v. Hann*, 4 Harrison, N. J. R. 166.

⁴ *Callen v. Thompson*, 3 Yerg. R. 475; *Maney v. Killough*, 7 Yerg. R. 410; *Mitchell v. Beal*, 7 Yerg. R. 142; *Wiley v. Lashlee*, 8 Humph. R. 717.

⁵ *Baylor v. Smithers*, 1 Littell, R. 112; *Goldsbury v. May*, 1 Littell, R. 256; *Hundley v. Webb*, 1 J. J. Marshall, R. 613; *Breckenbridge v. Anderson*, 3 J. J. Marsh. R. 710; *Allen v. Johnson*, 4 J. J. Marsh. R. 235. See *Watler v. Cralle*, 8 B. Monroe, R. 11.

⁶ *Howell v. Elliott*, 1 Badg. & Dev. 76; *Vick v. Keys*, 2 Heywood, R. 126; *Faulkner v. Perkins*, 2 Heywood, R. 224; *Smith v. Neil*, 1 Hawks, R. 341; *Trotter v. Howard*, 1 Hawks, R. 320.

⁷ *Barr v. Hatch*, 3 Ham. R. 529.

⁸ *Henderson v. Mabry*, 13 Alab. R. 713; *Beall v. Williamson*, 19 Alab. R. 55.

⁹ *Fleming v. Townsend*, 6 Georgia, R. 103.

issippi,¹ the later doctrine of the English courts is held, viz. that possession only affords a *primâ facie* evidence of fraud, which may be sustained, or rebutted, by proof of the other circumstances of the case. In South Carolina, the doctrine has been subject to fluctuations, but this doctrine seems also to obtain there now.² But in Virginia,³ Pennsylvania,⁴ Vermont,⁵

¹ *Foster v. Pugh*, 12 Smedes & Marsh. 416; *Comstock v. Rayford*, 12 Smedes & Marsh. 369. In *Garland v. Chambers*, 11 Smedes & Marsh. 337, it was held by this rule that possession of property by the vendor after a voluntary sale, is *primâ facie* evidence of fraud, does not apply to public forced sales, under execution or deeds of trust; and that in such sales the law does not infer fraud from the fact, that the property is left in the possession of the original owner, or that of her family; and where such a sale is made without a change of possession, it is for a jury to say, under all the circumstances, whether or not fraud in fact exists.

² In the case of *Croft v. Arthur*, 3 Eq. R. S. C. 229, the strict rule as to the effect of possession was said to be better founded. In *De Bardeleben v. Beekman*, 1 Eq. Rep. S. C. 346, the Court held, that if possession did not accompany an unrecorded bill of sale of chattels, it was void as to the creditors, although there was no doubt of the fairness of the transaction. Again, in *Kennedy v. Ross*, 2 Const. S. C. R. 125, the doctrine of *Edwards v. Harben* was affirmed. But in *Terry v. Belcher*, 1 Bailey, S. C. R. 568, and *Howard v. Williams*, 1 Bailey, S. C. R. 575, and *Smith v. Henry*, 2 Bailey, S. C. R. 118, the relaxed doctrine, that possession constitutes only *primâ facie* evidence of fraud was enunciated. But see again, *Anderson v. Fuller*, 1 McMullan, R. 27.

³ *Alexander v. Deneale*, 2 Munf. R. 341; *Robertson v. Ewell*, 2 Munf.; *Loud v. Jefferies*, 5 Randolph, R. 211; *Clayton v. Anthony*, 6 Randolph, R. 285; *Snydor v. Gee*, 4 Leigh, R. 535.

⁴ *Young v. McClure*, 2 Watts & Serg. 147; *Clow v. Woods*, 4 Serg. & Rawle, 275; *Welsh v. Hayden*, 1 Penn. R. 57; *Cowden v. Brady*, 8 Serg. & Rawle, 510; 2 Kent, Comm. Lect. 39, p. 522, 523, 524.

⁵ *Boardman v. Keeler*, 1 Aik. Verm. R. 158; *Mott v. McNeil*, 1 Aik. Verm. R. 162; *Weeks v. Wood*, 2 Aik. Verm. R. 64; *Fletcher v. Howard*, Ibid. 115; *Beattie v. Robin*, 2 Verm. R. 181; *Judd v. Langdon*, 5 Verm. R. 231; *Farnsworth v. Shepard*, 6 Verm. R. 521. In this case, Mr. Justice Mattock said: "This still remains the settled law of the land; and although some learned gentlemen have supposed the court would eventually retrace their steps, as the courts in some neighboring States have done, that

Illinois,¹ and Connecticut,² the strict rule of the old English law and of the United States Courts is adhered to. In New York, the doctrine has not been wholly settled, although it seemed to preponderate in favor of the rule declared in the United States Courts, that possession constituted a conclusive presumption of Law.³ This question is, however, now set at rest in that State

is, leave that as a badge of fraud to a jury, yet we are not disposed to recede a jot, nor to advance a whit, but to remain stationary upon this, in other governments, vexed question, so as to give this branch of the law, at least, the quality of uniformity." See *Wilson v. Hooper*, 12 Verm. R. 653.

¹ *Thornton v. Davenport*, 1 Scamman, R. 296. "In this Illinois case the true doctrine is laid down with precision. All conveyances, it is held, of goods and chattels, where the possession is permitted to remain with the donor or vendor, are fraudulent *per se*, and void as to creditors and purchasers, unless the retaining of possession be consistent with the deed, where the transaction is *bonâ fide*, and from the nature and provisions of the deed, the possession is to remain with the vendor, that possession being consistent with the deed does not avoid it, and therefore mortgages, marriage settlements, and limitations over of chattels, are valid without transfer of possession, if the transfer be *bonâ fide*, and the possession remain with the person according to the deed. But an *absolute* sale of personal property, and the possession remains with the vendor, is void as to creditors and purchasers, *even though authorized by the terms of the bill of sale*. The opinion of one of the judges in that case went to the whole length of the salutary doctrine, that the mortgagee or vendee taking a bill of sale for security, must take possession, even though the arrangement in the deed or mortgage be different, because the policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner."

² *Patton v. Smith*, 5 Conn. R. 196; *Swift v. Thompson*, 9 Conn. R. 63; *Toby v. Reed*, 9 Conn. R. 216; *Mills v. Camp*, 14 Conn. R. 219; *Osborne v. Fuller*, 14 Conn. R. 529.

³ In *Sturtevant v. Ballard*, 9 Johns. R. 337, it was held by Mr. Justice Kent, that if the vendor be permitted to retain possession in the case of an absolute bill of sale of chattels, it was an act of fraud in law, as against creditors, and that, though the agreement appear on the face of the deed, it would be equally so, unless some good motive at the same time was shown. The rule applied equally to conditional as to absolute sales, unless the intent of the party, in creating the condition, was sound and legal. The

by a statute, declaring, that unless a sale or assignment be accompanied by an immediate delivery, and be followed by an actual and immediate change of possession, it shall be presumed to be fraudulent and void, as against the creditors, &c., and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such assignment, that the same was made in good faith, and without any attempt to defraud.¹

result of this case was, that a voluntary sale of chattels, with an agreement either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown and approved of by the court, fraudulent and void as against creditors. In *Ludlow v. Hurd*, 19 Johns. R. 231, however, the question, whether possession constituted a presumption of fraud, or proof thereof, was left as a debatable point. And in *Bissell v. Hopkins*, 3 Cowen, R. 166, the doctrine of *Sturtevant v. Ballard* was entirely overthrown, and the doctrine asserted, that possession was merely evidence, and not proof of fraud. But in *Divver v. McLaughlin*, 2 Wend. R. 596, the doctrine of *Sturtevant v. Ballard* was again recognized. See also *Collins v. Brush*, 9 Wend. R. 198; *Tiffit v. Barton*, 4 Denio, R. 171; *McVickar v. May*, 3 Barr. R. 224.

¹ N. Y. Revised Stat. Vol. 2, p. 136, sec. 5, 6, 7. It is also enacted that the question of fraudulent intent, in all cases of fraudulent conveyances and contracts, shall be deemed a *question of fact*, and *not of law*. See *Cunningham v. Freeborn*, 11 Wend. R. 240; *Doane v. Eddy*, 16 Wend. R. 523; *Randall v. Cook*, 17 Wend. R. 53; *Smith v. Acker*, 20 Wend. R. 653; *White v. Cole*, 24 Wend. R. 116; *Buller v. Van Wyck*, 1 Hill, R. 438; *Cole v. White*, 26 Wend. 511; *Hanford v. Archer*, 4 Hill, R. 271. in which, nevertheless, this question was subjected to much change of opinion, and which may finally be considered as settled in the jurisprudence of New York by the two latter cases. Mr. Chancellor Kent (2 Kent. Comm. Lect. 39, p. 539, note *e*,) after reviewing all the cases, says: "And it may now be considered as finally settled in the jurisprudence of New York, and as the true doctrine of the Revised Statutes, that leaving the possession of chattels, on sale, or mortgage, or assignment, in the hands of the vendor, or mortgagor, or assignor, is only presumptive evidence of fraud, and it rests with the defendant to rebut that presumption as a matter of fact, by showing proof of good faith, and an honest debt, and an absence of an intent to defraud. The doctrine of the supreme court was, that there must appear to have been good and sufficient reasons, or some satisfactory excuse for non-

§ 526 *a*. Where the sale is of a thing having no present existence, but the expected produce of something to which the seller has a present vested right, — as a sale of a crop to be grown, or of the wool of existing sheep, — the owner of the principal thing may retain possession and general property in the thing produced, unless there is absolute fraud in the contract.¹

§ 527. In respect to this question, Mr. Chancellor Kent, after a review of the cases, says: “It is greatly to be regretted, that the rules of law in so material a point, and one of such constant application, are so various and so fluctuating in this country. Since the remedy against the property of the debtor is now almost entirely deprived of the auxiliary coercion, intended by the arrest and imprisonment of his person, the creditor’s naked claim against the property ought to receive the most effective support, and every rule calculated to prevent the debtor from secreting or masking it, to be sustained with fortitude and vigor. There is the same reason for the inflexible stability of the rule of law, that a vendor of chattels should not, at the expense of his creditors, sell them, and yet retain the use of them, as there is for that greatly admired rule of

delivery at the time, and that the presumption of fraud cannot be rebutted merely by proving good faith and absence of a fraudulent intent. The old doctrine was, that non-delivery, except in special cases, was fraudulent, and an inference of law for the court. The doctrine now finally settled in the senate is, that the whole is a question of fact for a jury. The chancellor (Walworth) and the supreme court have struggled nobly to maintain what I believe to be the only safe and salutary principle requisite to protect creditors and bar fraud. The senate have established, upon the letter of the Revised Statutes, the more lax and latitudinarian doctrine, which places the most common and the most complex dispositions of *property*, as between debtor and creditor, at the variable disposal of a jury. The president of the senate (Bradish) gave a learned historical review of the English and American authorities, and ably vindicated the decision of the senate.”

¹ *Smith v. Atkins*, 18 Vermt. (3 Washburn) R. 461.

equity, that a trustee shall not be permitted to buy or speculate in the trust fund on his own account ; or for that other salutary and fixed principle, that the voluntary settlement of property shall be void against existing creditors. Such rules are made to destroy the very temptation to fraud, in cases and modes that are calculated to invite it, and because such transactions may be grossly fraudulent, and the aggrieved party not able to show it from the character of private agreements, and the infirmity of human testimony. However innocent such transactions may be in the given case, they are dangerous as precedents, and poisonous in their consequences ; and the wise policy of the law puts the sting of disability into the temptation, and bars the door against every species of imposition, which might be inaccessible to the eye of the court. If a debtor can sell his personal property, and yet, by agreement with the vendee, continue to enjoy it for six years, as in one State, or for sixteen months, as in another, in defiance of his creditors, who can set bounds to the term of enjoyment, or know when and where to bestow credit, or how he is to make out a case of actual fraud ? Fraud, in fact, is reluctantly drawn by a jury, and their sympathies must be overcome by strong and positive proof, before they will readily assent to the existence of a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer.¹

§ 528. It is certainly to be desired, that some uniform system of Bankruptcy should be adopted throughout the United States, by which the whole subject of voluntary assignment, and sales without surrender of possession, should be settled, so that there might be a clear protection against underhand and secret arrangements made by debtors, when under failing circumstances, in fraud of their creditors.

¹ 2 Kent, Comm. Lect. 39, p. 531, 532.

§ 529. In respect to the effect of a non-surrender of possession, in case of a sale of personal property, there is one modification to the rule, which should be here noticed. Where from the circumstances of the case an immediate surrender of possession is impossible, — as, if there be a sale of a ship, or of goods at sea, — the want of possession will not afford a presumption of fraud; unless, after the arrival of the ship or goods, it or they are allowed to remain for an unreasonable length of time in the hands of the vendor.¹

§ 530. And here the present treatise ends. In the course of our investigation into the law of sales of personal property, some questions have necessarily arisen which do not seem to have been adjudicated in England or America, and others in respect to which the decisions are contradictory and conflicting. In such cases, resort has been had to the rules of the Foreign Law, whenever they seemed to be analogous to the principles of the Common Law. No scruple has been had in ingrafting and transplanting into the present treatise, whatever has seemed legitimate to American jurisprudence, and recommended itself to common sense and the practical needs of commercial intercourse. We have not hesitated to go even further, and to challenge any rule which seemed to contradict common sense, and to give precedence in such cases to the rule of the Foreign Law, whenever it seemed better grounded in principle and justice. The Common Law, however it may command our respect as a system, has yet many dead branches not vivified by principle, which were the growth of a feudal age, and by which it is only encumbered and deformed. The Law has not in many cases kept pace with the expansion of commerce, the growth of cities, the partial emancipation of woman, and the abolition of serf-

¹ *Conard v. Atlantic Ins. Co.* 1 Peters, R. 449; *Bucknall v. Royston*, Prec. in Chan. 285; *Sturtevant v. Ballard*, 9 Johns. R. 338; *Bissell v. Hopkins*, 3 Cowen, R. 166, and cases there cited.

dom. It seems to be the office of America, in whose population many nations are represented, and in which society is peculiarly composite, to absolve itself from the arbitrary limitations of mere precedent, and taking the Common Law as the basis of its jurisprudence, to modify its existing rules, and to enlarge its boundaries by extracting from the Foreign Law whatever is suitable to the exigencies of commerce and the requirements of justice. The greatest reproach to Law is to be found in its dead forms and merely arbitrary rules, and the more it is liberalized and simplified, the more it will command respect.

INDEX.

The references are to the sections.

A.

SECTION.

ACCEPTANCE,

what acceptance of goods by the purchaser is required by
the statute of frauds 276 to 281

ADULTERY,

when it absolves the husband from liability 62 to 66

AGENTS,

what a general and special agent 71
rights of agents 72, 73
duties of agents 74
liabilities of agents 75, 76
ratification by principal of contracts for 77
auctioneers 79 to 85

(See AUCTIONEER.)

brokers 85 to 90

(See BROKER.)

factors 91 to 107

(See FACTOR.)

ships' husbands 108

(See SHIPS' HUSBAND.)

master of ships 109 to 119

(See MASTER OF SHIP.)

partners 119 to 125

(See PARTNERS.)

warranty by, when binding on his principal 350, 351

(See WARRANTY.)

ALIENS,

what is an alien 18

when they can make a contract of sale 19

cannot sell during war unless by license 19

	SECTION.
ANIMALS FERÆ NATURÆ,	
can be sold, when	211, 215
what are	211, 215
how property is acquired in them,	211
ASSENT OF PARTIES,	
may be express or implied	125
reasonable time allowed for acceptance of a proposal	126, 127
when an offer can be withdrawn	127
when an offer is made by letter it will be considered as accepted, when	127 to 133
an acceptance must correspond in terms to the offer	136
a written contract merges all previous treaty	137
must be mutual and free, and without mistake	139
never implied in cases of duress	141
mistake of law is no defence to a contract	142
unless in cases of fraud	143
mistake of fact avoids a contract, when	145 to 158
(See MISTAKE.)	
distinction between mistake and ignorance	157
ASSIGNMENTS,	
voluntary, when valid	512 to 516
ASSUMPSIT,	
(See INDEBITATUS ASSUMPSIT.)	
AUCTIONEER,	
what is an auctioneer	79
his rights and duties and liabilities	79 to 85
is an agent of both parties for what purposes	468, 470
is entitled to compensation, when and how	470, 479
may sue either party, when	471
his measure of diligence	472
is bound to observe all instructions of his principal, and all conditions of sale	473
where a deposit is made, he holds it as stake-holder	474, 478
cannot delegate his authority	475
cannot purchase goods of his principal	476
liabilities of	477
is liable for interest, when	478
where he is guilty of negligence in securing his commis- sions he cannot recover, when	479
liability in cases of warranty	480
of fraud	481
of by-bidding	482 to 484

	SECTION.
AUCTION, SALES BY,	
definition of	460
when completed	461, 462
effect of fraud or mistake in	462
effect of printed condition in	463
what is an entire contract of sale by auction	464
operation of statute of frauds upon	465 to 469
effect of by-bidding, puffing, &c. on	482 to 484
any combination or confederation of persons to depress the price in, is fraudulent when	483
B.	
BILL OF EXCHANGE,	
effect of giving, as to rescinding of contracts, after breach of warranty	425
	(See RESCINDING.)
BILL OF LADING,	
effect of assignment of, upon the right of stoppage <i>in</i> <i>transitu</i>	343 to 348
effect of pledging a	347
an assignment of, completely transfers the goods included in it	346
BILL OF PARCELS,	
constitutes a warranty, when	358
BROKERS,	
rights, duties, and liabilities of	85 to 90
is agent of the parties, when	87, 89
commission of	86
cannot delegate his authority	88
BY-BIDDING,	
effect of, in sales by auction	482 to 484
C.	
CASE,	
action on the, may be brought in cases of breach of con- tract of sale, when	432
CAVEAT EMPTOR,	
when this maxim applies	349, 378, 416
COMMISSIONS,	
of auctioneer.	470, 479
CONTRA BONOS MORES,	
sales, are void	488, 489

CONCEALMENT,

when it operates as a fraud	174 to 182, 382 to 386
(See FRAUD.)	

CONDITIONAL DELIVERY,

its effect	313
----------------------	-----

CONDITIONAL CONTRACTS OF SALE,

definition of	246
conditions precedent and subsequent are what	247, 248, 252
sales "on trial," "on arrival," on "sale and return,"	
are conditional sales	249, 250
incidents of such sales	219, 250
precedent conditions must be strictly performed	251
illegal or impossible conditions are void	251
foolish or difficult conditions are binding	251
when conditions are implied	253
rights of vendor in	400

CONDITIONS OF SALE,

effect of printed, in sales by auction	463
printed, can be varied by parol evidence, when	463
should be signed	463

CONSTRUCTIVE DELIVERY,

when sufficient to pass the title	311, 312
(See DELIVERY.)	

CREDIT,

where it is given, what is the remedy of the party for non-	
compliance with the terms	236
effect of, upon stoppage <i>in transitu</i>	327

CREDITORS,

voluntary assignments by debtors to, when void	512
may be made where they do not operate	
as a fraud upon	513
may be made for the benefit of, when	514
debtor may give a priority to certain	
creditors, when	515
effect of a stipulation for a release of	
liability in	516

D.

DAMAGES,

in case of a resale by the vendor on breach of contract	436, 437
where the vendee refuses to take goods after the title is	
passed	436
before the title is passed	438

SECTION.

DAMAGES, *continued*.

where the goods, though not corresponding to the agreement, are retained by the vendee	439
where the title is passed and the vendee refuses to pay for the goods	441
where credit has been given	442, 443
in cases of fraud	447
in case the vendee utterly fail to perform his contract	448
in case he partially fail	448
where the vendor will not surrender the goods	412, 449
where the vendor retains them unreasonably or beyond the agreed time	450
where the warranty fails and injury results	454
ordinary measure of damages upon breach of contract of sale	412

DECLARATION,

on implied warranty	364, 365
on an alternative contract	453

DECOY DUCKS,

in sales by auction, effect of	482 to 484
--	------------

DELIVERY,

the delivery required by the statute of frauds must be an an absolute and entire surrender of all claims	276 to 280
what delivery is sufficient to destroy the lien of the seller	286, 293
when the goods are in the hands of third persons	289
what is sufficient to pass the title of goods sold	296
duties of the seller as to	297 to 300, 388 to 393
to what person it should be made	305, 306
to what place it should be made	307 to 309, 391
at what time it should be made	310
constructive, when sufficient	311, 312, 390, 392
conditional, its effect	313
what is necessary in an executory contract, where the article is to be made	315
where it is to be paid for by instalments	316
where materials are supplied	317
what is a sufficient, to destroy the right of stoppage <i>in transitu</i>	331
the goods must have come to the hands of the vendor or his agent not for the purposes of transmission to the vendor	332 to 338
they must have reached the place of present destination	335

	SECTION.
DELIVERY, <i>continued</i> .	
the taking of samples when sufficient	338
effect of symbolical delivery upon right of stoppage	339
effect of the giving a delivery order .	340
distinction between delivery orders and negotiable dock-warrants	341
effect of part-delivery on the right of stop- page	342
rights of vendee when the vendor refuses to make delivery	412
DELIVERY ORDER,	
effect of, on the right of stoppage <i>in transitu</i>	340
how it differs from a negotiable dock-warrant .	341
DESCRIPTION,	
in a bill of parcels or receipt, when it constitutes a warranty	358
DRUNKARDS,	
contracts of, are void when	15
DURESS,	
avoids a contract	140
E.	
EARNEST,	
as required by the statute of frauds is what	273 to 275
rule as to, upon breach of the contract	428
ENGROSSING,	
is not now illegal	490
ENTIRE CONTRACTS,	
definition of	240
incidents of	240
cannot be rescinded in part and enforced in part .	245
in sales by auction	464
EXECUTED CONTRACTS OF SALE,	
what are	231
EXECUTORY CONTRACTS OF SALE,	
definition of	232
when the property passes to the orderer	233, 315
where the price is paid by instalments .	234, 316
where the orderer supplies materials .	235, 317
where credit is given	236
remedy, where the terms of credit are unbroken	236
where the price is advanced	315
damages for non-performance of	239 a

	SECTION.
EXECUTORY CONTRACTS OF SALE, <i>continued.</i>	
when within the statute of frauds	239
when a warranty is implied upon	371, 372
EXPECTANCY,	
cannot be sold	186
EXPRESS CONTRACTS OF SALE	229
EXPRESS WARRANTY, (See WARRANTY.)	
EXTRINSIC FACTS,	
when a concealment or misrepresentation of, is a fraud	172, 382

F.

FACT,	
mistake of, (See MISTAKE.)	
FACTOR,	
powers of	91, 93 to 96
rights of	92
commission of	92
when he can sue personally	94
lien of	97
when he may sell	98
must obey the orders of his consignor	100
measure of diligence required of a	102
can delegate his office, when	103
can pledge, when	104 to 107
FEMES COVERT, (See MARRIED WOMEN.)	
FERÆ NATURÆ,	
animals, can be sold, when	211, 387
what are	211, 213
how property is acquired in them	211, 215, 387
FORESTALLING,	
not now illegal	489, 490
FRAUD,	
invalidates the contracts of infants	28
by a partner, when it binds the firm	121
avoids all contracts	158, 420
party defrauding can avail himself of his fraudulent act,	
when	159
must be clearly established	160
distinction in the Roman law between <i>dolus malus</i> and	
<i>dolus bonus</i>	161, 162
by Roman and Scottish law a contract was only liable to	
reduction for	163

FRAUD, *continued*.

<i>A misrepresentation must be of a material fact to constitute</i>	
fraud	166
it must have been injurious and actually misled the	
other party	167, 380
it must be of such a nature as that the party de-	
ceived had a right to rely on it	169, 380
expressions of mere opinion and puffing are not	
fraudulent misrepresentations	169, 361, 382
unless in cases of especial trust	170, 171, 383
misrepresentations of <i>extrinsic</i> facts	172, 382
misrepresentations by a third person	173
<i>Concealment, when it constitutes fraud</i>	174, 381 to 385
there must be a legal or equitable obligation to di-	
vulge	174, 181
of extrinsic facts, when it is a fraud	175
by the vendor, when he knows that the vendee is	
deceived, is a fraud	176
of extrinsic facts, when it is a fraud	179
of latent defects	179
distinction as to concealment, between executed and	
executory contracts	180
may arise from over-influence over a weak-minded person	182
statute of frauds (<i>See STATUTE OF FRAUDS.</i>)	
sale may be rescinded for	420, 456
any combination of persons to depress the price at sales by	
auction is a fraud, when	484

FRAUDULENT SALES,

(*See FRAUD.*)

sales by creditors are fraudulent, when	512 to 516
(<i>See CREDITORS.</i>)	
<i>mohatra</i>	517
effect of sales where the property is to remain in the pos-	
session of the vendor	518 to 528
when it is not fraudulent	529

G.

GOODS BARGAINED AND SOLD,

assumpsit for, when it can be brought	433
(<i>See INDEBITATUS ASSUMPSIT.</i>)	

SECTION.

GOODS, WARES, AND MERCHANDISE,

the meaning of these words as used in the statute of
frauds

262, 263

GOODS SOLD AND DELIVERED,

assumpsit for, when it can be brought

433, 436

(See INDEBITATUS ASSUMPSIT.)

H.

HORSE,

warranty of

362

HUSBAND,

is liable on the contracts of his wife, only when he has

authorized or assented to them

52 to 60

when his assent is presumed

55 to 57

where she is separated from him for his adultery, he is

not liable even for necessities

62, 66

while she lives with him he is liable for necessities . .

63

if she elope, when he is liable

64, 65

I.

IDIOT,

what an idiot is

11

cannot be a party to a contract of sale

9

except for necessities

14

IGNORANCE,

of fact, distinguished from mistake

157

ILLEGAL SALES,

sales, *contra bonos mores*, what are

488

to a prostitute when illegal

488

of libellous and indecent works

488

against public policy are void

489

what are

489 to 491

sales in restraint of trade are

against

492

restrictions as to time and

place

492, 493

sales of a public office

494

agreement not to bid at public

auction

495

sales in violation of a statute

496, 497

where the statute is directory

498

ILLEGAL SALES, *continued.*

sales on Sunday	500 to 502
trading during war with an enemy, when illegal	503
distinction between illegal and void sales	504, 505
a sale good in itself, when in furtherance of an illegal act	
is void when	505, 506, 507
sales of goods to be smuggled, when void	507, 508, 509

(See FRAUDULENT SALES—SMUGGLING.)

IMPLIED WARRANTY, (See WARRANTY.)**IMPLIED CONTRACT OF SALE,**

when nothing is said as to the terms, what is presumed . .	230
--	-----

IMPOSSIBLE AND ILLEGAL CONDITIONS,

are void	251
--------------------	-----

INDEBITATUS ASSUMPSIT,

where goods are sold on credit, it can be brought when . .	236
for goods sold and delivered, can be brought when	433
for goods bargained and sold, can be brought when	433, 436
where credit is given, can be brought when	434, 442, 443, 444
where the vendee refuses the goods	436, 438
where in such case, the vendor resells	437
where the goods, although they do not correspond to the	
warranty, are retained	439
where the vendee refuses to pay for the goods	441
in cases of fraud	446, 456
where the vendee fails to perform his contract	448
where the vendor refuses to surrender the goods	449, 452
where he retains them unreasonably	450
where the contract is entire, and the vendor will only deliver	
a part	451
where the contract is in the alternative	453
where there is a failure of warranty	454, 455
where the vendee refuses to receive the goods	457
where the contract is broken as to the identity of the article	458

(See REMEDY.)

INDECENT AND IMMORAL WORKS,

sales of, are void	488
------------------------------	-----

INFANT,

what is an infant in law	20
when bound to perform executory contracts of sale	23, 24, 25
when bound to perform executed contracts	26
cannot plead infancy as a defence to actions in tort or fraud	27, 28
contracts necessarily injurious to him are void	22

SECTION.

INFANT, *continued*.

contracts which may be beneficial, are voidable	22
what constitutes a ratification by him on coming of age	29, 30
is bound by contracts made under statute authority — con- tracts of marriage and in <i>autre droit</i> — and for necessities	32, 33
what are necessities	34, 38
not liable for the purchase of wares to carry on his trade	38
cannot bind himself to pay a sum certain even for necessities	39

INTERPRETATION,

express warranty, how interpreted	361
---	-----

INTRINSIC FACTS,

when the concealment or misrepresentation of, is a fraud	172, 382
--	----------

L.

LATENT DEFECTS,

warranty against, when implied	374, 375
--	----------

LAW, MISTAKE OF,

(See MISTAKE.)

LIBELLOUS WORKS,

sales of, when void	458
-------------------------------	-----

LIEN OF THE SELLER,

what is a lien	282, 284
it depends upon possession	283, 288
differs from stoppage <i>in transitu</i>	239
what is a surrender of possession sufficient to destroy the lien of the seller	286
it does not depend on possession	291, 292
what is a sufficient delivery to destroy his lien, when the goods are in the hands of a third person	259
when a part delivery will destroy	290
when possession is voluntarily surrendered for a limited space, or a special purpose, it does not destroy the lien of the seller	292

LUNATIC,

when he can be a party to a contract of sale	9, 10, 11
--	-----------

M.

MARKET OVERT,

what is	190
sales in, when void	191
English statutes as to	194 to 198
law of, in United States	199

MARRIAGE,

executed contracts of by an infant are binding . . . 32

MARRIED WOMEN,

are not personally liable during coverture . . . 44

unless her husband is civilly dead . . . 46

or is an alien, and has never resided in the country . . . 47

or is unheard of for seven years . . . 48

or unless by the custom of London . . . 49

or unless the husband deserts her . . . 51

or is divorced from her . . . 52

the husband is liable on her contracts only when he has

authorized or assented to them . . . 53, 54, 60

consent of the husband is presumed when . . . 55, 56, 57

when liable in cases of fraud . . . 58, 59

after she is separated from her husband, when he is liable

for her contracts . . . 62 to 66

if she elope, when he is liable on her contracts . . . 64, 65

MASTERS OF SHIPS,

authority of . . . 109

can delegate his authority when . . . 110

may purchase equipments for the vessel . . . 112

when liable personally . . . 113

when he can sell ship and cargo . . . 114 to 117

can only sell them in cases of moral necessity . . . 118

MEASURE OF DILIGENCE,

required of the vendor in preserving goods sold . . . 393

MERCHANTABLE,

warranty that goods are, when implied . . . 368 to 370

MISREPRESENTATION,

when it constitutes fraud . . . 162 to 173, 382 to 386

(See FRAUD.)

MISTAKE,

of law, avoids a contract . . . 142

unless in cases of fraud . . . 143

when money paid under a mistake of law can be

recovered . . . 144

of fact, avoids a contract when . . . 145

if it be an injurious mistake of a material fact 145, 146

although the person mistaking might have avoided

the mistake . . . 146

of the person, will avoid a contract when . . . 147

SECTION.

MISTAKE, *continued.*

as to the nature, extent or quantity of the subject-matter or contract, will avoid a sale	148, 150, 151, 152
as to the existence of the article sold, will avoid the contract	149
as to price, when it avoids a contract	153
as to ownership of the subject-matter	152
as to sale of articles of arbitrary value and of absolute value, distinction between	154
as to title or extent of interest, when it avoids the contract	155
of facts, and ignorance of facts, distinguished	157

MOHATRA,

is fraudulent,	517
--------------------------	-----

MONEY HAD AND RECEIVED,

cannot be brought while the contract remains open and rescinded	431
---	-----

(See RESCINDING OF CONTRACT.)

can be brought where there is a total failure of the vendee to perform his contract	448
---	-----

MUTUAL ASSENT, (See ASSENT.)

N.

NECESSARIES,

what are	34 to 36
must be suitable in quantity and quality	36

NEGOTIABLE INSTRUMENT,

may be sold although the seller have no legal right to it	192
---	-----

NOTE, PROMISSORY,

where it is given, the contract may be rescinded on failure of warranty, when	425
---	-----

O.

OFFER,

should be accepted within reasonable time	126, 127
when it can be withdrawn	127
when binding if made by letter	130, 131

ORDER,

sent by letter, when it is considered as accepted	131 to 134
when it is ambiguously expressed, the orderer is liable	136
where wrong goods are sent through mistake of order, what is the duty of orderer	138
when the property passes to the orderer of articles to be made	233

OPINION,

mere expression of, is not a warranty 361

OUTLAWS AND PERSONS ATTAINED,

cannot sell 17

P.

PARTIES,

parties to contract of sale 9

when idiots and lunatics can be 10, 11

drunkards can be 15

outlaws and persons attained can be 17

aliens 18, 19

infants 20 to 40

married women 40 to 66

seamen 67

slaves 68

agents 70 to 123

rights and duties of (See VENDOR AND VENDEE.)

remedies of (See REMEDY.)

PARTNERS,

partners are mutual agents 119

cannot submit any matter to arbitration 120

can execute a specialty, when 120

may bind his copartners, when 121

fraud by 121

where exclusive credit is given to 122

PATENT DEFECTS,

not covered by a general warranty 354

POSSESSION,

the ordinary test of lien 286

when it is not 291, 292

PRICE,

must be in money or its negotiable representative 218

rights of parties when a bill of exchange or note is taken 219

must be definite and certain, or capable of ascertainment 220

when nothing is said as to, a reasonable price is implied 221

reasonable price not always the market value 221

must be actual and serious 223

inadequacy, when sufficient to avoid a sale 224

the vendee must tender the whole price before he can take

any of the goods 225

duties of vendee in regard to 403

PROMISSORY NOTE, (See NOTE.)

SECTION.

PROSTITUTE,

sales to a, when void 488

PROVISIONS,

unwholesome, contracts for the sale of are void . . . 210

when a warranty is implied in the sale of . . . 373

PUBLIC POLICY,

sales against, what are 489, 491

are void 489

sales in relation of trade 492

restrictions as to time and place 492, 493

sale of a public office 494

agreements not to bid at public auctions 495

sales in violation of statutes 496

sales on Sunday 500, 502

trading during war 503

sales of goods to be smuggled 507, 509

(See FRAUDULENT SALES.)

PUFFERS,

when bidding by at auction sales, vitiates the sale 482 to 484

R.

RATIFICATION,

of his contract by an infant, what constitutes . . . 29, 30, 31

of contracts of an agent by his principal 77

REASONABLE TIME,

in returning goods, what is 426

RECEIPT,

constitutes a warranty, when 358

REGRATING,

not now illegal 490

REMEDY FOR BREACH OF CONTRACT OF SALE,

trover may be brought when . . . 430, 434, 440, 442, 446, 449

assumpsit may be brought when 430

while the action is open a special action must be brought 431

when it is rescinded, money had and received will lie . 431

when there is fraud an action on the case will lie . . . 432

indebitatus assumpsit for goods sold and delivered may be brought, when 433

indebitatus assumpsit for goods bargained and sold may be brought, when 433

when a special declaration is necessary 433, 445

	SECTION.
REMEDY FOR A BREACH OF CONTRACT, <i>continued.</i>	
what action will lie on a breach of a sale on credit . . .	434
of the seller, where the vendee refuses to take the goods	
after the title is passed	436
before the title is passed	438
where the goods, though not corresponding to the agreement, are retained by the vendee	439
where the title is not transferred, and the vendee refuses to pay for the goods	440
where the title is transferred, and the vendee refuses to pay for the goods	441
where credit has been given	442, 443
where the vendee refuses to give a note or bill according to his agreement	444
where the vendee has fraudulently possessed himself of the goods	446
in cases of fraud	447
of the buyer, where there is a total failure by the vendor	
to perform the agreement	448
where there is a partial failure	448
where the vendor refuses to surrender the goods	449, 452
where he retains them for an unreasonable time	450
where the contract is an entirety, and the vendor refuses to deliver the <i>whole</i>	451
where the contract is alternative, there must be a special declaration on failure of warranty	453, 454
in cases of fraud	456
in case the vendor receive goods back which do not correspond to the warranty	456
where the vendee is specially authorized to return goods not corresponding to the warranty	456
on breach of warranty, on a sale by sample	456
where the vendor utterly refuses to receive the goods again	457
where the contract is broken as to the identity of the article	458

SECTION.

RESCINDING THE CONTRACT OF SALE,

the parties may rescind, where there is a special agreement	
to that effect	416, 417, 456
where there is a breach of contract	
on a sale by sample	418
where the vendor receives back the	
goods unconditionally	419, 456
in cases of fraud	420, 456
in cases of breach of contract of	
warranty, when	421, 422
when the contract is executory	422
when the contract is entire, and the	
seller will only deliver a part	451
where there is a failure of title,	
when	423
where there is an utter inability or	
refusal to perform the contract by	
one party	424, 448
where a bill of exchange has been	
given, and there is a failure of	
warranty	425
where the vendee refuses to deliver	
the goods after the title is passed	452
duty of a vendee in rescinding a contract	426
must return the goods in reasonable time	426
both parties must be replaced in the same position when	
a contract is rescinded	427
RETURNING GOODS,	
goods must be returned within reasonable time	426

S.

SALE,

what is a, by the common law	1, 8
Roman law	2, 7
Scottish	4
Holland	3
France	5
parties to contract of	9
idiots and lunatics	10 to 15
drunkards	15
outlaws and persons attainted	17
aliens	18, 19

SECTION.

SALE, *continued*.

infants	20 to 40
married women	40 to 66
seamen	67
slaves	68
agents	70, 123
auctioneers	79 to 85
brokers	85 to 90
sailors	91 to 97
ships' husbands	108
masters of ships	109, 119
partners	119 to 123
mutual assent of parties to, when implied	125
where there is a mistake of law	142 to 145
where there is a mistake of fact	145 to 158
where there is fraud	158, 181
by misrepresentation	166 to 173
by concealment	173 to 182

Subject of

must have an actual or possible existence	184, 185
must belong to the seller	188
sale of in market overt	190 to 199
statute as to in England	194, 195
where it is acquired by fraudulent means it can be sold	200, 202
where acquired by felony or finding it cannot	231
right of the purchaser where there is a total or partial failure of title to	203, 206
must not be prohibited from sale by law or morals, or public policy	206, 210
animals <i>feræ naturæ</i>	211, 215

The Price,

must be in money or its negotiable representative	218
when a bill of exchange or promissory note is taken	219
must be definite and certain	220
actual and serious	223
inadequacy of, when it avoids a sale	224
when nothing is said as to price, a reasonable price is implied	221

SALE, *continued.**Different Species of Contracts of Sale,*

express and implied contracts	229 to 231
executed and executory contracts	231 to 239
entire and severable contracts	240 to 246
conditional contracts	246

Lien of the Seller,

depends ordinarily on possession	283
what is a sufficient surrender of possession to destroy	286, 289

Delivery,

different species of	295
what sufficient to pass the title	296, 313
in executory contracts, where the article is to be made	315 to 317
what sufficient to destroy the right of stoppage <i>in transitu</i>	331 to 342

Stoppage in Transitu,

effect of	320, 321
who may exercise the right of	323, 324
how and when it may be exercised	320 to 340, 399
when the transit is determined	331 to 347
effect of part delivery on	342
assignment on	344, 345

Warranty,

who can make	350, 351
what constitutes an express	352 to 362
when a warranty is implied	366
as to title	367
that the goods are merchantable	368 to 370
that the goods are fit for the use and purpose for which they were bought	371
in executory contracts	371, 372
in the sale of provisions	373
as to latent defects	374, 375
in sales by sample	376
where goods are not of the nature supposed	377
contract may be rescinded for failure of, when	421, 422, 456

Duties and Rights of Parties,

duties of vendor	387 to 397
rights of vendor	398 to 402
duties of vendee	403 to 406
rights of vendee	407 to 414

SALE, *continued*,*Rescinding the Contract of Sale,*

when parties may rescind	416 to 428
a breach of contract of warranty	421, 422
a failure of title	423
a total inability or refusal by either party to perform the contract	424, 448, 452
where the vendor receives back the goods unconditionally	419, 456
fraud	420, 456
duty of parties in rescinding	426, 427

Remedies and Damages,

remedies of parties for breach of contract	430 to 458
(See REMEDY AND DAMAGES.)	

Sales by Auction,

when completed	461, 462
effect of fraud or mistake in	462
printed condition	462
operation of statute of frauds on	465 to 469
effect of by-bidding, puffing, &c., on	482 to 484
effect of a combination of persons to depress the price	483

Illegal and Fraudulent Sales,

sales <i>contra bonos mores</i>	488
against public policy	489 to 495
in violation of a statute	496 to 502
with an enemy	503
of smuggled goods	507 to 509
a sale good in itself is void if in furtherance of illegality	505 to 507
fraudulent sales by creditors	512 to 516
where there is no change of possession	518 to 529

SAMPLE,

taking of a, effect upon stoppage <i>in transitu</i>	338
warranty, in cases of sale by	376
vendor may rescind where there is a sale by, when	418

SEAMEN,

contracts of	67
------------------------	----

SELLER, (See VENDOR.)

SEVERABLE CONTRACTS,

definition of and incidents of	242 to 244
--	------------

SHIP'S HUSBAND,

duties and powers of	108
--------------------------------	-----

	SECTION.
SHIPS, MASTERS OF,	
powers and duties of	109 to 118
(See MASTERS OF SHIPS.)	
SLAVES,	
their rights to contract	68
can buy only themselves	68
SMUGGLED GOODS,	
contracts for the sale of, when binding	208, 507 to 509
SOUND,	
meaning of the term "sound," as used in the warranty of a horse	362
STATUTE,	
sales in violation of, are void	206, 207, 496 to 509
contracts authorized by statute when made by an infant are binding	32
of frauds (See STATUTE OF FRAUDS.)	
STATUTE OF FRAUDS,	
history of	256
fourth section of, requires what	257
what is a contract to be performed in a year under the statute	258
seventeenth section requires what	259
when it applies to executory contracts	260
includes sales where several articles are bought, each for less than ten pounds	261
what are goods, wares, and merchandise	262, 263
sales by auction are within	264
what the memorandum required must contain	266, 269, 270
what is an agent under this statute	267, 268
requisitions as to price	270
terms	269, 270
conditions	271
as to giving in earnest or part payment	273, 274, 275
what is the acceptance and delivery required	276
must be a final and absolute appropriation by the purchaser, and surrender by the seller	276
acceptance by a middleman not sufficient	276
operation of upon sales by auction	465 to 469
memorandum may be made by clerk, when	468
requisitions of the fourth section	257, 258
seventeenth section	259, 276

	SECTION.
STOLEN GOODS,	
cannot be sold	168
STOPPAGE IN TRANSITU,	
how it differs from a lien	281, 318, 319
a contract is not rescinded by	320
effect of	320, 321
who may exercise the right of	323, 324
how it may be exercised	325
when it can be exercised	326 to 310, 399
the goods must be unpaid for	327
effect of partial payment	327
credit	327
composition of the debt	328
the vendee must be insolvent	329
the goods must be in transit	330
what goods are considered in transit	331
when and how the transit is determined	331 to 340, 401
the goods must have come to the hands of the ven-	
dor or his agent, not for the purpose of transmis-	
sion to him	332 to 338
they must have reached the place of present desti-	
nation	335
taking of samples, effect of	338
effect of symbolical delivery	339
effect of giving a delivery order	340
part delivery on	312
transferring a bill of lading	313 to 317
.. SUBJECT OF SALE,	
must have an actual or possible existence at the time of sale	181
or must be the natural product or expected increase of some-	
thing to which the seller has a present vested right	185
a mere possibility or contingency not dependent on a pre-	
sent property or interest, cannot be sold	186
need not have a physical and corporeal existence	187
must belong to the vendor, and he can only sell his legal	
interest	188
where the vendor has obtained a title by fraudulent means	
he can sell	200, 202
where he has stolen or found goods he cannot sell	201
must be neither prohibited by law, morals, nor public	
policy	206, 207
where it is smuggled the sale is good, when	208

	SECTION.
SUBJECT OF SALE, <i>continued</i> ,	
unwholesome provisions cannot be legally sold	209
animals <i>feræ naturæ</i> can be sold, when	211 to 215
SUNDAY,	
sales on, when void	500, 502
SYMBOLICAL DELIVERY,	
when it passes the title to goods sold	312
effect of upon stoppage <i>in transitu</i>	339
T.	
THIEF,	
cannot sell a thing stolen	188
sales by, statutes in England in respect to	194 to 198
time of delivery, when essential	310
TITLE,	
when the vendor has no title he cannot sell	201
when he has a partial title he may sell, when	202
rights of vendee on failure of	203, 204
when it is passed in cases where goods are ordered to be made	233 to 235
(See EXECUTORY CONTRACTS OF SALE.)	
what delivery is necessary to pass the title to goods	296 to 317
warranty of, implied when	367
contract may be rescinded on failure of, when	423
TRADING,	
with an enemy during war illegal, when	503
TRANSITUS, (See STOPPAGE IN TRANSITU.)	
TRIAL, SALES ON,	
incidents of	250
remedies of parties	456
TROVER,	
may be brought by the vendee when the vendor refuses to deliver, when	413
when it may be maintained	430
(See REMEDY.)	
V.	
VENDEE,	
may abandon the contract on a failure of title, when	203, 204
must take the goods, when there is no agreement as to delivery	301, 404
may reject the contract on the ground of fraud, when	385, 411
duties of, in regard to price	403

VENDEE, *continued*.

is liable for rent and expenses of keeping the goods, when	404
duties, when the goods are not such as were ordered	404, 405
must return them, when	405, 410
can rescind the contract, when	406, 407, 415 to 428
rights, where there is a total or partial failure of title	407
when he can resell goods consigned to him	409, 436
rights of, when the vendor refuses to deliver	412
when the vendee is bound by the maxim <i>caveat emptor</i>	416
may rescind where there is a special contract enabling him to do so	417
where there is a sale by sample	418
where the vendor receives back the goods	419
where there is fraud	420
where the contract is executory	422
where there is a failure of title	423
where there is a refusal or inability to perform the contract	424
duty of a vendee in rescinding a contract	426
(See RESCINDING THE CONTRACT.)	
remedies of a vendee in case of breach of contract	430 to 458
(See REMEDY.)	
duty of, when the warranty is broken and the price is unpaid	455

VENDOR,

can only sell what he has a legal title to	188, 387
unless in the case of a negotiable instrument	192, 387
cannot sell goods stolen or found, so as to pass a good title	200, 202, 387
can sell goods obtained fraudulently	200, 387
can only recover the agreed price, when it has been fixed	222
can sell animals <i>feræ naturæ</i>	307
is bound to <i>deliver</i> the goods sold, when	388
where credit is given	388
where there is an express agreement	388
must do all that is required by the usage of trade	389
must deliver the goods at what place	391
measure of diligence required by vendor in preserving goods sold	393
is entitled to be paid for storage and expenses, when	394
must make good his warranty according to its terms	363, 395
cannot enforce his contract when he is guilty of fraud	396
has a lien when and under what circumstances	282 to 293, 398

SECTION.

VENDOR, *continued*.

what will divest him of his lien	286 to 293
(See LIEN.)	
duties of, as to delivery, so as to pass the title	297, 302 to 317
(See DELIVERY.)	
remedy of, where the vendee refuses to accept goods	314
not liable beyond the express terms of warranty	363
has a right of stoppage <i>in transitu</i> , when	320 to 347, 399
how this right is determined	331 to 340, 401
rights of, where the sale is conditional	400
may sell the goods upon refusal of them by the vendee,	
when	402
may rescind, when	415 to 428
(See RESCINDING THE CONTRACT OF SALE.)	
remedies of a vendor in case of breach of a contract	430 to 458
(See REMEDY.)	
may resell, when	436, 437

W.

WARRANTY,

need not proceed from the vendor personally	350
by agent, when binding	350, 351
what constitutes an express warranty	352, 357
seller must make good his warranty according to its terms	353
general, does not extend to patent defects	354
express, is binding, although the seller examines the goods	355
when words of description create a warranty	358
when it must be made	357
simple commendation, or mere expression of opinion is	
not a warranty	360
express, how interpreted	361
meaning of "sound" in a warranty of a horse	362
vendor not liable beyond the express terms of	363
implied warranty, difference between old form of declaring	
on, and new form	364, 365
when a warranty is implied	366
when a warranty of title is implied	367
when a warranty that goods are merchantable is im-	
plied	368
where the goods are not open to the buyer's exa-	
mination	369
sound price, when it implies a warranty	370

	SECTION.
WARRANTY, <i>continued</i> .	
when a warranty that goods are fit for the use and purpose for which they are intended is implied .	371
when a warranty is implied on an executory contract to supply or make goods	371, 372
when a warranty arises on the sale of provisions	373
when a warranty is implied against latent defects	374, 375
where goods are sold by sample	376
where goods are not of the nature of those for which they are sold	377
contract may be rescinded for breach of, when	421, 422, 456
WEAK-MINDED PERSONS,	
when their contracts are void	11
WRITTEN CONTRACT,	
merges all previous negotiation	360

KF 915 S88 1853

Author

Vol.

Story, William Wetmore

Title

Copy

A Treatise on the law of sales of
personal property

Date

Borrower's Name

